IN THE COMPETITION APPEAL TRIBUNAL

Case No:1579/4/12/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 10th July – Wednesday 12th July 2023

Before:

Hodge Malek KC
Michael Cutting
Derek Ridyard

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Applicants

(1) Cérélia Group Holdings SAS
(2) Cérélia UK Limited

V

Respondents

Competition and Markets Authority

A P P E A R AN C E S

Brian Kennelly KC and Alison Berridge (On behalf of Cérélia) Instructed by Willkie Farr & Gallagher (UK) LLP

Robert Palmer KC and Mike Armitage (On behalf of Competition and Markets Authority)

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

Tuesday, 11 July 2023

(10.15 am)

(Delayed start)

(10.20 am)

Submissions by MR KENNELLY (continued)

THE CHAIR: Yes, Mr Kennelly.

MR KENNELLY: Good morning.

THE CHAIR: Good morning.

MR KENNELLY: Members of the tribunal, before I turn to the internal documents, I wanted to come back to a point that Mr Ridyard raised with me yesterday, his thought experiment, and just address it now, so there's no misunderstanding about the discussion we had yesterday.

Now as far as I could understand it from the transcript, your point, sir, was that if there's some consumer diversion from brand to private label, then the merger increases the merged entity's incentive to raise price because some of the lost sales would be internalised within the merged group, the classic horizontal unilateral effect.

MR RIDYARD: My description of what I understood is that the SLC (several inaudible words).

MR KENNELLY: Now that assumes that Jus-Rol, in this scenario, is essentially setting the consumer price. That might be the case if they were selling direct to consumers or if the retailers were simply passive in this, like in a farmer's market, but what we see from the evidence is that the retailers are very far from passive agents. They can react to a change in the wholesale price in different ways. They can pass it on wholly or partially or they can absorb the price increase.

Now whether the retailers pass it on depends on different circumstances from those that drive the Jus-Rol pricing. So we ask: what are the retailers' considerations? Now they already enjoy the benefits of diversion between brand and private label, to the

extent that happens, and that does not change with the merger. If the retailers believe that a price increase will cause their customers to stop buying Jus-Rol but then not buy anything else, the retailers may absorb the price increase.

Now if they think the customers will pick up a similarly profitable product, then they will likely pass on the price increase. In that cost benefit assessment the retailer undertakes, diversion is key.

Now if the retailers absorb the change, they will no doubt take some sort of action vis-a-vis the supplier. They could re-tender for a new private label supplier or look for a new branded supplier if one is available. This process that I am describing, this stage where the retailers' incentives and the question of diversion is so important, this is something the CMA has not examined. That's why I said at the very beginning of my submissions yesterday, this is a crucial component to the thought experiment that Mr Ridyard put to me.

To the extent that the CMA claims that this is part of their theory of harm, it's not examined by them in the decision at all. This question of the cost benefit assessment that the retailers undertake is not examined by them.

Now the CMA mentions the theory, in passing at least, and we see it in the Final Report. If I could ask you to take up that Final Report. It's in the core bundle, tab 3, page 221.

Page 221, paragraph 9.102. They say there:

"We found evidence that the retailers adjust their mix between private label and branded products to reflect anticipated end consumer demand and we consider this will include their anticipation of how retail demand will change, in response to a deterioration in the offering. In this way, the link between end consumer choices and demand of the retailers is a key driver of the rebalancing constraint between the parties. That is the parties have an incentive to keep their supply offers competitively

priced as there is a threat that they may lose volumes and sales to the other channel, if they deteriorate their offer. We conclude the evidence supports the view the parties exert a material competitive constraint on each other and Cérélia's private label pricing is more commonly cited as a constraint on Jus-Rol. It's significant in both channels."

The theory here is cited but as you see in this paragraph and throughout the Final Report, there's no actual examination of what the retailers' incentives are when they undertake this analysis themselves, as to whether or not to pass on any such theoretical price increase. For that, diversion is central. Again, not examined and we know diversion is worth examining. Any rational regulator would look at it closely because of what we've seen in the documents about diversion.

But the other point is that this theory they outline is separate from their main theory of harm. To be absolutely clear what that is, we see it at 9.101. It's on page 221. It's the preceding paragraph. They say:

"It's possible for retailers to adjust their share of shelves allocated to private label and branded. While the preference is that end consumers are an important factor, retailers take into account various commercial considerations, such as which supplier gives the best offer on cost of goods. Regardless of whether retailers pass on a wholesale price increase to their end consumers, we have found that their optimal shelf allocation across private label and branded will shift away from the channel which deteriorates its offer."

That's the central theory of harm and that does not depend on pass-on to consumers or absorption of price increases. That's what I was emphasising yesterday.

Now if I could go to the internal documents. I will start with the Cérélia documents and will take you to the parties disclosure bundle, tab 8. It's tab 8, page 6743. I will just check this is in the CMA's disclosure bundle, so I will give you the right references. But I am in the parties' disclosure bundle, tab 8, 67.3. Yes, it's in the disclosure bundle,

the CMA disclosure bundle, as well the confidential one, the same tab. I am looking at 67.3. Sorry, it's tab 8A, forgive me. Tab 8A. I don't see in this bundle. It's only in the parties' disclosure bundle, not in the CMA's confidential bundle and it's tab 8A.

This -- and I will take care, obviously, it's a confidential document -- this concerns a retailer de-listing a Cérélia product. We see on page 67.3 an email from Cérélia to the retailer, offering new products and even a product to resemble a Jus-Rol product, if that's what the retailer wants. So if you could read first, please -- and the CMA obviously relies on this -- the email on the bottom half of page 67.3, especially the third main paragraph. **(Pause)**

There's no need to go beyond the bottom of that page. The passages you've read are the passages upon which the CMA relies, so we ask: what does the retailer say in response? Do we see the retailer exercising implicitly or explicitly this replacement threat in order to obtain better terms and conditions and reverse any decision to divert volumes between the channels?

So we look to 67.2 and as you see from -- well first of all, 67.2, bottom half, shows you the email from the retailer to Cérélia and the first point is the decisions are reversible. So we are in classic negotiation exercise of leverage territory. The decisions are irreversible but we know that there is an opportunity to get the reviewer in GSCOP to examine it. So it is possible to reverse it, if they can be persuaded.

In the email itself, we see the reasons they give. The second paragraph down, these are the reasons, not a replacement threat or the exercise of commercial negotiation leverage. There's a reference to over-crowding. The tribunal knows what the word "tail products" means and one sees in that second main paragraph in the email, the reasons that are given. Again, customer preference is central.

Now the bottom paragraph on that page, 67.2. Pausing there, this is the passage the CMA relies on to say that: the reason why we don't see explicit exercise of the

negotiating leverage they say the retailers enjoy, is because of a concern about competition law. But as the tribunal can see here, that is not what the retailer is saying. They are not saying: we refuse to compare our offering between you and someone else because it would breach competition law. On the contrary, they are saying the opposite. They are saying: we are not favouring anyone. It's the opposite of exercising leverage. They are saying: our reasons have not got to do with preferring anyone over you.

Over the page, the top of 67.3, again the reasons that are given there do involve an assessment that for certain product groups for cheaper products, it is important not to have too much differentiation, it's important for value and it's important to give consumers what they want. That's the first main paragraph at the top of 67.3. But what we don't see is any suggestion that negotiating leverage is being exercised so as to get better terms from the private label supplier.

On the contrary, they are saying: this is a decision which is driven by consumers and they are not asking for anything from the private label supplier.

It's not hinted at or it's not -- I mean here we would say: okay, it's implicit but where is the hint, where is the nod and a wink? It's the opposite of that and this is relied upon by the CMA to show the exercise of the implicit rebalancing threat and in our submission, it's not probative of that at all.

The next point that the CMA relies on is the fact that Cérélia monitors the quality of Jus-Rol products and their prices and when the tribunal comes to look at the documents, and I will just give you the references, you will see that the prices that are being marketed are retail prices. And that's not surprising because as everyone accepts, these products compete at the retail level to an extent and when you go through the documents cited by the CMA, you will see it's retail pricing that is being compared.

Now I will turn, if I may, to the Jus-Rol documents, the internal documents of Jus-Rol.

THE CHAIR: They are unlikely to be able to monitor wholesale prices.

MR KENNELLY: Indeed. Indeed. But they don't -- again, I can't take you to every one of the documents. There are lots of documents that show price monitoring but none of those documents show you, even implicitly, the exercise or a concern about a rebalancing threat being exercised by the retailers.

Now we turn to the internal documents of Jus-Rol and these the CMA relies on heavily and what they show is that Jus-Rol certainly does regard private label products as competing with it on retailer shelves. That's not in dispute. But it's clear that Jus-Rol see them as retailer products. Cérélia is not the competitor from Jus-Rol's perspective.

If we go first to tab 58. It's in the parties' disclosure bundle 2, tab 58, page 917. Now the CMA relies on these documents to show that there is a competitive constraint between Jus-Rol and Cérélia and this is one of many documents that show that Jus-Rol regards itself as being in competition with private label products. My point is that all of these documents are about Jus-Rol's concern about how they are faring vis-a-vis private label on the supermarket shelves.

If you look at the top of page 917, Jus-Rol raises a concern about losing what they say is share, to private label. My simple point here, in common with all these documents, is that it is the fact which is common ground that there is a degree of competition on the shelves but it does not follow, as I have said many times, that there's the exercise of negotiating leverage between the retailers vis-a-vis Cérélia and Jus-Rol at the wholesale level. That depends on the analysis I described in opening which is not conducted by the CMA.

The next page that the CMA relies on is 1162, behind tab 64. Tab 64, 1162. These are all documents that are supposed to show the implicit rebalancing threat. 1162 behind tab 64. And, again, what we see is a concern by Jus-Rol that it loses market

share to private label and that simply reflects the diversion we've already seen, where there is competition on the shelves between Jus-Rol and private label. But what is not coming out of these documents anywhere is a concern by Jus-Rol, where they say: we are being pushed on price or quality by the retailers because they are threatening to shift volume away from us to private label. All these documents reflect the fact that they are losing because the consumers, to the extent they are losing, the consumers are preferring private label over Jus-Rol and, again, that reflects the price monitoring. If you go to tab 65, page 1237, the CMA relies on this to show that Jus-Rol is ensuring that it prices appropriately vis-a-vis private label. They take that from the capitalised text at the top of the page. Again, none of that is surprising if they are competing, as we accept they do, on the shelves. But there's nothing from these documents to show the exercise or concern about rebalancing, in the sense that the CMA has raised in its SLC. Central to all of this is the diversion, the diversion between Jus-Rol and private label and to that extent there is evidence about diversion here too, at tab 62, page 1116. Forgive me, it's 62A, 1116.3.

Tab 62A, 1116.3, third bullet. So Jus-Rol is concerned about shoppers switching to private label but they still remain relevant because that percentage of shoppers are cross-shopping between brand and own label.

So a rational regulator looking at these diversion figures, and you've seen the diversion figures from yesterday, would see immediately that it's not at all straightforward that retailers would absorb a price increase, if that's what the merged entity did. It's not at all straightforward that the consequences will flow in the way that Mr Ridyard put to me yesterday because of these diversion figures and the complex question of how the retailers would in fact, react, if in fact, shoppers were buying nothing if the product they want isn't there.

MR RIDYARD: Can you say that point again. I wasn't quite sure what you are getting

at.

MR KENNELLY: The point is that diversion is centrally important to the analysis I described yesterday and in my opening remarks this morning.

MR RIDYARD: Yes.

MR KENNELLY: The CMA is assuming that the retailer will pass on the price increase.

MR RIDYARD: At least some of it anyway, yes.

MR KENNELLY: At least some of it. But for it to be material for a SLC finding, they need to do more than that and in order to work out what the retailer will do in practice, the question of diversion is absolutely key. Because as I said again yesterday and this morning, if the diversion figures show that the shopper can't buy a Jus-Rol product, for example, they won't buy any dough-to-bake product, then the retailer has an incentive to -- and depending on the materiality of --

MR RIDYARD: If there's no diversion, there's not going to be any SLC.

MR KENNELLY: Exactly, and that's why these diversion figures have to be examined and it's not a question of 100 per cent diversion or zero per cent.

MR RIDYARD: Yes.

MR KENNELLY: The retailer will decide, based on the extent of the price increase, looking at diversion, whether to absorb of not.

MR RIDYARD: How much to absorb.

MR KENNELLY: That's what informs whether an SLC exists or not.

THE CHAIR: Isn't it also whether or not there's diversion in fact, but it's the ability to divert because that's the threat, isn't it?

MR KENNELLY: Absolutely.

THE CHAIR: And an ability to divert in the future.

MR KENNELLY: That's a predictive exercise of course.

THE CHAIR: Yes.

MR KENNELLY: But this is not beyond the capability of the CMA. We've seen many other merger cases, the CMA looks at diversion figures and in a supermarket context because of the tracking data, it's even easier to get diversion information than in other contexts. The CMA has not asked those questions.

MR RIDYARD: Right. The CMA, when the CMA or any competition authority looks at diversion ratios in grocery products, I mean it can only look at the retail prices, can't it? I mean in general anyway because we don't have information, comprehensive information about everyone's wholesale price.

So is it not fair to say in general, that whenever that analysis is done, there's an implicit assumption that there is a relationship between wholesale prices and retail prices. Because the concern is with competition at the wholesale level, if it's a manufacturer merger but the competition authorities typically look at retail level competition to assess whether there's diversion ratios. So within that, there must be this implicit assumption that retail prices depend to some extent on wholesale prices.

MR KENNELLY: That, to some extent, is the key qualification there. But that's something that is built in.

MR RIDYARD: So your point is that the CMA should have done more to explore the link between wholesale prices and retail prices, as well as doing more to look at what the diversion rations are, once you get to retail prices.

MR KENNELLY: To an extent, yes, but that's part of the concern. First, that's the work they should have done before looking at the evidence of the implicit rebalancing threat at all. That's why I opened with that point because when one looks at what we see about diversion here and what we say about the fact customer preferences are absolutely central, it's highly unlikely that there would be this implicit rebalancing threat and it's highly unlikely, we say, that -- certainly you cannot assume, as the CMA has,

that there will be this significant pass-through of any cost increases on the merged entity.

So the first time they need to do this diversion analysis and then look and see is there actual evidence of this implicit rebalancing threat at all. By that, I mean distinct from decisions taken simply on the basis of consumer preferences. It would --

MR RIDYARD: But if --

MR KENNELLY: (Inaudible due to overspeaking) the outline of 9.101 in the Final Report.

MR RIDYARD: Just to test a little bit the idea that you can't assume that there is pass-through of prices from wholesale to retail level and from a manufacturer selling my product to a retailer, if I believe I can raise my wholesale price and the retailer will kindly just absorb that and carry on selling my product at the same price as it was before, it's a bit of a win-win for me, isn't it? I make a higher margin and the consumer doesn't see any difference.

MR KENNELLY: No. Two things. First of all, you have my point that we can't assume that there is this significant pass-through but, secondly, as I said this morning, if the retailer is stuck with the price increase, can't pass it through because its customers want Jus-Rol and if they don't get Jus-Rol, they are not going to buy the private label at all, there is something the retailer can do which is the retailer can, if it's on the private label side, re-tender for a new private label supplier, and I will come to the competition that exists there, and if it's branded products, well then they have fewer options but there are options on the branded side also. But if the CMA is right that there is this diversion between Jus-Rol and private label, it's enough to show a constraint on the private label side and that is why it's so important to look at the alternatives that are available to Cérélia on the private label supplier side so the retailer is not stuck, the retailer is not constrained in that way.

So where is the evidence of the implicit replacement threat in the Jus-Rol documents? The CMA cites in that same bundle, PDB2, at tab 54.

THE CHAIR: Can I just go back. So one way of looking at it or one factor is that the rebalancing threat is not simply looking at one channel rather than the other, you are saying the real threat, if there is going to be a threat, is the ability to say to Cérélia: if you are going to put your price up, we just get another PL supplier when it comes to renewal of this contract which is, typically, not more than 24 months or whatever the period is.

MR KENNELLY: Yes, absolutely.

THE CHAIR: You say that is a more credible threat than Jus-Rol because Jus-Rol has a relatively loyal customer base.

MR KENNELLY: Jus-Rol is --

THE CHAIR: And the people who really like that product will -- it's easier, if you are going to have a threat, to have the threat on the PL side, than on the other side.

MR KENNELLY: Indeed, and that's why on the PL side, there is evidence of retailers saying --

THE CHAIR: I have seen on the PL side there's evidence, yes.

MR KENNELLY: Again, the reason why you see evidence of the retailer saying: watch it, we are going to switch to Bells or Henglein, move on this, move on -- the reason why you see it is because that's the threat. It's not surprising that where the threat exists, there's evidence and where the threat doesn't exist, there isn't. So the CMA struggles to find bits and pieces to show the cross-channel constraint and one of the documents --

THE CHAIR: Sorry, just moving on a bit further from that, Mr Kennelly. Looking at the evidence we went through yesterday and some of the other things I have looked at, it does seem to me that a significant proportion of the main retailers believe that

they do have that implicit threat. Do you accept that?

MR KENNELLY: I accept that -- yes, a proportion of the retailers said that to the CMA and --

THE CHAIR: You have showed it to us yesterday.

MR KENNELLY: I am not saying it was said in bad faith.

THE CHAIR: No, but --

MR KENNELLY: There's some confusion, even on the part of the retailers, and, and, they have their own commercial consideration. They have a concern that in some way this merger weakens their ability to get PL supply. We've seen that too. Now that's not correct and that's not the CMA's theory of harm. But that is something which is gnawing away at some of these retailers and in my submission, that's informing what we see them saying to the CMA about the merger.

MR CUTTING: But one of the things that's troubling me and perhaps you can help me with these slides, is that the proposition you put to us is that these slides don't give an internal evidence for Cérélia or Jus-Rol being aware of and alive to the threat of rebalancing being made by any of the supermarkets.

But what these slides do show is switching and competition between branded and private label which is the CMA (inaudible) rebalancing threat. So that these slides are consistent with the existence of the conditions in which rebalancing would be an effective threat.

MR KENNELLY: Sorry, sir, you say they are consistent with the conditions --

MR CUTTING: Absolutely.

MR KENNELLY: Yes, and that's why, the discussion I had with Mr Ridyard yesterday, there was a kind of a linear discussion, where you have these conditions which the CMA say build up to the implicit rebalancing threat. So my point was that, in reality, they don't need to get to the implicit rebalancing threat because when consumers

prefer one over the other, even when that's anticipated by the retailers, we see the retailers shifting volume between the private label and branded and that's what we see in the documents. What we don't see is the next stage which is the CMA's theory of harm, which is that the retailers say to Jus-Rol and Cérélia: if you don't improve your terms, we will switch volumes, but if you do fix them, if you do lower your price or improve quality, we will not switch, as part of a negotiation in a tendering exercise or as part of a discussion with Jus-Rol. That last step doesn't happen because there's no need for it to happen. The decisions retailers take are driven by what we see in the documents, these consumer preferences and retail competition. This implicit rebalancing threat is an add-on the CMA has invented which doesn't exist in the documents you've seen.

True it is, sir, that the documents I am showing you about consumer preferences don't prove there is no implicit rebalancing threat but what I am trying to show you is that you see the exercise of such competition as there is and it's at the retail level. What you don't see is the wholesale level of competition the CMA alleges, where the retailers will be saying to Cérélia and Jus-Rol: improve your terms and conditions and if you don't, we will switch volumes away from you. That's what we don't see.

MR CUTTING: Okay, so that's very clear. But the context within which a retailer says: I am having to de-list four of your products because, I am paraphrasing, the shelves are overstocked, I am having to put things on end-wise and so what I am getting rid of is the tail. The decision to de-list those four because he wants to rationalise down to ten products, that's a decision in which he's de-listing those four out of a range of 14 and he's making a decision to de-list those four own label or branded because he's preferring a different mix which includes the own label or the branded. So in effect, that is a rebalancing because he's making a decision: I've got limited shelf space. Your four, great email about how brilliant they could be but they

are going because I am preferring the other six. Isn't that -- that's effectively rebalancing?

MR KENNELLY: It is but it's rebalancing for the reasons I was describing earlier. It's rebalancing to reflect actual or anticipated consumer demand. What it doesn't reflect is negotiating leverage. The key thing the CMA goes on about in the constraint is this lever which is used to drive better terms and conditions and better prices and that's just not there. They are not using it as a lever because this switching between Jus-Rol and Cérélia is, obviously, far less important than the threat within the channels. Or whatever other reason, the retailers are not using this, even implicitly, as a lever to get better terms and conditions from Cérélia or Jus-Rol.

That is the SLC. That's the constraint. The existence of that negotiating lever is what they say will be removed, causing the SLC.

MR CUTTING: Okay.

MR KENNELLY: I completely understand all of us and I am sure the CMA as well, struggle with this fact, that the product is on the shelves, it's competing on the shelves. Surely it follows there must be some leverage at the wholesaler side. But if you dig deeper, you realise that only exists if the retailer, doing his own cost assessment analysis, decides that it's worthwhile for it to say: I want a lower price from you, even if that means I won't have as much of your product or I will have none of your product and I will wear that. I will make some money from you, I will save some money from you, supplier, and I will wear the downstream consequences of my customers. That depends on absorption of price increase or not and it depends upon diversion and that's the key analysis that really tells you whether the retailers even have the incentive to exercise this kind of leverage. And that's not been done. The CMA assumes price increases are passed on, the leverage must exist and, therefore, a constraint is being removed.

So, again, it's a two-stage analysis. We say first of all, without that analysis about the retailers' own cost benefit assessment and pass-on and diversion, you are not even in the ballpark of that leverage existing. Okay, let's look at empirical evidence. Where is the evidence of that leverage being used, actually being used? It's not there.

Those slides that you see don't tell you anything about the exercise of leverage. It's all inferred and there comes a point where, after 10,000 documents, you just can't keep inferring it, not least when the leverage is exercised in other contexts and recorded.

This is why I asked the tribunal to look at the documents and say: is this really probative evidence, not just of consumer-led competition, consumer-led reallocation decisions, but of leverage exercised by the retailers, threatening to switch volumes if terms and conditions don't improve?

THE CHAIR: At some stage we are going to have to discuss what I meant in Tobii about probative evidence because what one regards as evidence may be quite important at the end of the day.

MR KENNELLY: So --

THE CHAIR: Let me finish.

MR KENNELLY: Sorry.

THE CHAIR: If someone says X and they believe X to you --

MR KENNELLY: Yes.

THE CHAIR: -- that's evidence. It may be you can say it's weak evidence. You may say it's evidence that is opinion evidence or you could say there's an element of speculation. But that is a form of evidence. It's not merely submission, as I use sometimes in some of the rulings.

Once you accept or not that you've got what constitutes evidence, then it may be a question of what weight someone gives to it, as to whether or not that evidence can

be relied upon or used. I suspect what the CMA's case is going to be when we hear Palmer later on today, is that it's not for us to weigh evidence and see how strong or how compelling it is. That's our job and it may be that different people will take different views as to whether or not that evidence can be relied upon. But these are issues I would like to be addressed at some stage by you and Palmer because it's fairly fundamental to where we go on this. But you don't need to do it now. Just throwing it out in the middle of your submissions. You will have a break a bit later and then you can think it through.

MR KENNELLY: Sir, I will address you right away, if I may.

THE CHAIR: Of course you can.

MR KENNELLY: I don't want the tribunal to think I am trying to run anything novel, legally. I fully accept that if the tribunal thinks reasonable people could disagree about the meaning of this evidence, then I lose. This is a rationality challenge. I have to show you that this evidence base, reviewed by you, cannot reasonably bear the SLC finding. It cannot reasonably, on a rationality approach, ground the SLC finding that the CMA -- sorry, just --

THE CHAIR: Aren't you really saying that -- and you can correct me if I am wrong -- that while the material we've seen is evidence, you are saying it's not probative evidence? But it's up to you. It's up to you how you want to put it. But that's one way of looking at what we've seen or not, subject to what Palmer has to say on this issue. There's different ways of skinning this cat and there's a number of different ways of looking at what the test is and how you apply it but one thing that I need some help on is how the parties submit -- the essential question is (a) evidence and I think it's difficult to deny that we've seen evidence, but what is probative evidence because it's got, in my view, to have some value.

MR KENNELLY: Sir, you've taken the words out of my mouth. I mean I can hopefully

help you straight away by saying that analysis which is in Tobii and in Dye & Durham, in fact, as well, from yesterday --

THE CHAIR: Yes.

MR KENNELLY: -- is exactly the submission which I made to you yesterday which is that it's for the tribunal to review all this documentation, not to rely simply on summaries, but the question for you then, having reviewed it, is: sure, it is evidence. I can't say there is absolutely nothing there. There is evidence there. The question for you is, is it probative? Can it reasonably support the decision which the CMA has taken? My submission is although there is a lot of material, it is not probative of the particular implicit rebalancing threat upon which the SLC rests.

That's the legal point. By probative, I mean probative within the Tobii sense. I don't mean if you take a different view. I mean probative in the sense that the tribunal found in Tobii and in other cases. Probative meaning it just can't reasonably bear the meaning which the CMA has ultimately given it to ground its SLC finding.

On questions of weight, where, in the course of my submissions, I have said: how can the CMA place significant weight on this, when it doesn't even say the thing the CMA says it says, again, weight is for the CMA in the first instance. If the tribunal is to disturb the CMA's finding of fact, you have to find that they were irrational, in terms of the weight they gave it.

THE CHAIR: Or that -- if they, and this is something I raised yesterday. We've got the probative point, okay. That's that. The next point which is what I was trying to address yesterday, is that if, in fact, they misrepresent the evidence, so they say: the evidence is X but in fact it doesn't say X, then surely that's something that we can take into account. So there are really two limbs to this, aren't there? An attack can be -- I am not saying I am on any one side, I just want to get the right answer. You know me. There are two avenues, aren't there? There is the probative avenue and

have they misrepresented the evidence they, in fact, get?

Because you may have a situation where you've got two pieces of evidence, they contradict each other. The CMA prefer one piece of evidence over the other and that's fine, they can do that. If, in fact, they say: the evidence says A but when you look at the evidence, it doesn't say A, it says either B or A minus. A with a huge caveat which makes it not really A, but it's A minus rather than B. But these are things that -- those are the sort of two avenues that I, for my own part, will want to explore at some stage with, obviously, Palmer and I am doing it now with you.

MR KENNELLY: And my response, sir, is that we are making both of those points. We are exploring both of those avenues, as I said in my opening and they are very closely linked. One is that when you look at the evidence base, it's not probative. When I showed you the findings in the Final Report that purport to reflect this evidence, they don't. They are very closely linked because the CMA --

THE CHAIR: But you will be giving me a schedule of references on that tomorrow.

MR KENNELLY: Of course.

THE CHAIR: Because it's really important to follow that through.

MR KENNELLY: Indeed. That's why I want to give you that and the CMA will obviously have their comments on it. I am not going to take you -- tracking each reference through.

THE CHAIR: No, you don't need to but, yes, okay. Can I just make some notes.

(Pause)

Okay, yes.

MR KENNELLY: I think we are looking at now, the evidence the CMA cited to show the implicit rebalancing threat in other Jus-RoI documents and I was asking the tribunal to go to tab 54 in PDB2, page 628.

It's an email, an internal email. You see the reference to a de-listing decision by

a retailer, the email in the second half of the page. The short point here is there is a de-listing. At the bottom paragraph, there's the rationale which they understand from the retailer which is that some of their customers will switch to own label, who would otherwise have bought Jus-Rol. It's not clear how many but some will. But we look for the evidence of this being linked to some leverage or negotiation on the part of the retailer vis-a-vis the supplier and we see nothing. What we see is their reason. It's the first line of the email that I have asked you to look at and there's a reference to distribution changes.

Again, nothing here to suggest that further step which is the heart of the CMA's theory of harm. No evidence of any competitive pressure being exercised at Jus-Rol's expense or anything like that.

The next email is on tab 69, the same bundle, page 1332. This is an email from Jus-Rol. On the right-hand side, you see the start of the chain. It's an email from Jus-Rol to a different retailer. It appears to be referring to a proposed price increase from Jus-Rol, where Jus-Rol is explaining itself. On the left-hand side of the page you see the response from the retailer. The CMA relies on the fact that in this discussion about whether to wear the Jus-Rol price increase or not, the retailer mentions prices offered by private label manufacturers. You see that at the top of the page on the left-hand side.

Now, again, the CMA says: well this is all you need to see. I repeat the submission I have made previously and one I made to Mr Cutting. One needs to look more closely and say: what is actually happening? The retailer is pushing back hard on the Jus-Rol pricing but there is no suggestion that it might rebalance towards own label. True it is, they appear to be using own label, private label suppliers as a benchmark or as a tool to criticise the proposed price from Jus-Rol but this is still not evidence of a negotiating lever that is threatening to switch away from Jus-Rol to private label.

MR RIDYARD: But if you know, everyone knows that we are sharing a more or less fixed bit of shelf space between branded and private label products in this category, I mean how -- could it not be argued it's unavoidable to think that anything that the branded supplier loses out on is going to benefit the private label and vice versa? Isn't that somewhat inevitable, once you've got this sort of zero sum gain between the two players?

MR KENNELLY: It may be but that's not enough, in my submission, to say that the retailers are actually using this -- that natural consequence is that is what happens. They are not using it as a negotiating lever. They are not saying: because of this switching that we think can happen, you need to give us better prices, otherwise we will divert volumes from you, away to own label or private label. All we are seeing here is a reference to a price benchmark. It's not a reference to the exercise of any negotiating leverage between the retailer and the Jus-Rol supplier.

Now what the tribunal is doing is looking and seeing can you read in -- the CMA says it's implicit, so you have to read into this the existence of a rebalancing threat, but these are price negotiations. When they want to say things explicitly, they say them. They say, they would say: we will switch volumes away from you and we will wear the harm with our customers because your price is too high. That's what you would expect them to say if they were genuinely exercising that kind of threat, there's no need for it to be implicit, and we just don't see it. What's interesting is, finally, we see an email where this kind of price comparison is being made in a negotiation.

Now it's not the implicit rebalancing threat but it shows that when they want to negotiate in writing, they do. In fact, this undermines the CMA's point that: well it's all understood and it's always successful which is why we don't see written records. This suggests that when they want to make comparisons, they do so and we rely on the fact this is the only email where we've seen this so far. Of course, no competition

concern. I mean the CMA says: the reason why you don't see documentary records of comparisons is because of competition issues: not so. So to the extent the CMA relies on this, I also say, to the extent they get anything from it, out of these thousands of documents we see one email that doesn't even go all the way, we say, that's necessary for their implicit rebalancing threat.

All it shows is that you can use a price comparison to get a better wholesale deal. It doesn't say that you will switch volumes if that price is changed.

So that's all I want to show you from the documents, the internal documents. My submission, echoing the discussion I had with the chairman a moment ago, is that this is not, looked at as a whole, probative evidence of the particular constraint that the CMA identified. It's not probative evidence to support an SLC. That's not simply because reasonable people would disagree about what it means. We say it's woefully insufficient to make out this rebalancing threat upon which the CMA rests its case.

But my next point is that even if I am wrong about that and this replacement threat exists and is material, the loss of that constraint makes no difference because Cérélia is still constrained in the private label side.

MR CUTTING: Sorry, before you go there, can I just have a last question for you on your rebalancing analysis. I suppose my question is derivative of the discussion with the chairman about the nature of the evidence. In a sense, I take from what you've said, many things, but in my simple thinking about it, one of the things that I take from it is that there may be evidence that the conditions in which the rebalancing threat could have been made were there because there's a degree of branded own label competition, but on your analysis, there's no evidence that up until the merger, that threat was ever made, either against Jus-Rol or against Cérélia.

But does that leave a slight gap, in the sense that, as the chairman said, a number of the supermarket buyers clearly said and felt that they were losing an ability to make

that rebalancing threat against the merged firm? So that at your high point, what you are saying is there's no evidence past, pre-merger, about that rebalancing threat but that leaves open the question whether that threat might have been more valuable in the future, post-merger, and it's inherent in the CMA's job that it is making a judgment about the conditions post-merger in the future. So in that context, does one weight more the evidence of the supermarket buyers, who say: I am worried that I am losing the ability to threaten rebalancing against that future stuff and that that threat and the evidence of that threat has some weight, per the chairman's discussion, because it relates to a future? And that, therefore, although you've taken us through the absence of the threat being made in the past, actually that's not a knock-out blow you would hope for it, because really, what the CMA is concerned about is the future. I just wanted to throw that at you before you move on, if that's okay. Come back to us again --

MR KENNELLY: I am really grateful for the question, that's not the usual barrister premise.

MR CUTTING: It might be.

MR KENNELLY: Because it allows me to deal with the counterfactual, but I will deal with it in two ways. First of all, true it is, the chairman said to me: the supermarkets are saying things without substantiation, they are saying some things which the CMA is relying upon. But that's why, in our appeal, we say the CMA cannot, rationally, rely uncritically on these statements by supermarkets, they must substantiate them, as they tried to. When they failed to get substantiation, they cannot rationally rely upon them. That's the first point.

The second point is Mr Cutting's: what about the future? Could the constraint be more important in the future? The short point is the CMA's counterfactual is no different from the current position. So in the CMA's counterfactual, nothing changes. So there's

no suggestion by them that the constraint will operate differently in the counterfactual, compared to the actual. That's no part of their case.

The evidence then, of the private label manufacturers, the key point here is that Bells and Henglein have significant spare capacity. The fact they have small current market shares is irrelevant if they have the ability and incentive to step in and take significant market share from Cérélia; that constrains Cérélia.

So, to the evidence on that, I will start with Bells. The CMA's error here is tied up with its irrational investigation which we cover in ground 1B because, as the tribunal has seen, the CMA failed to revisit its provisional conclusions, when faced with material new evidence. They concluded provisionally on two occasions that Bells had limited capacity, before recognising that Bells had substantial excess capacity; and they concluded provisionally that few retailers recognised Bells as a credible supplier, before getting evidence showing that, in fact, further retailers clearly thought Bells was a potential supplier. It completely undermined their provisional view on Bells as a competitive constraint. It should have led to a complete reappraisal and it didn't.

I want to rely for these submissions on many of the findings the CMA makes itself and so I would ask the tribunal to go to the Final Report.

THE CHAIR: On this, you are saying that it illustrates a problem that once someone takes a view on something, you want to confirm what your view is and so when something else comes in, you always try and look for reasons as to why that doesn't affect your initial assessment.

MR KENNELLY: Yes.

THE CHAIR: And different people have different abilities to cope with that. Some people take the view: well, if new evidence comes in, I am going to put that in the wash. If I change my view, it's fine, I don't need -- I have no axe to grind on this, I'll just change my view. Other people are different. Some people are relatively stubborn

in life and that it doesn't matter what comes in, once they've formed a view -- and maybe you would say that about some judges you've been before -- it doesn't matter what you say, they are not going to change their mind, even if you can show they are completely wrong.

So what you are saying on Bells is the award of that not insignificant contract should have -- they should have stepped back and said: look, this does change. But it does look as though they did step back to a certain extent because they did take it into account and they considered it.

MR KENNELLY: They took it into account but what they did with it, we say, ultimately, is irrational. I'll take you to how they looked at it themselves.

THE CHAIR: Of course we need to look at that.

MR KENNELLY: The Final Report, 9.139. Page 250, please.

THE CHAIR: Perhaps we'll do that after the break.

MR KENNELLY: Yes.

THE CHAIR: On timing, do you think you will finish by one?

MR KENNELLY: I hope so, yes.

THE CHAIR: Yes, so you've got until one then.

MR KENNELLY: Yes, thank you very much.

THE CHAIR: And then that will give Palmer enough time. If he needs more time, we start early tomorrow and we finish late tomorrow, but I don't want anyone to be rushed on this, okay.

We will rise.

(11.22 am)

(A short break)

(11.34 am)

THE CHAIR: Yes, Mr Kennelly.

MR KENNELLY: So we were in the core bundle, the Final Report at tab 3, page 245, please. This is paragraph 9.175D. This is some factual background to the question of the constraint that Bells can exercise.

Now these are estimates put forward by the parties but, obviously, Cérélia, as a major supplier, is well placed to offer these estimates and as far as I can see, the CMA does not disagree with them. So let's look at 9.175D and the share of supply calculations. According to the CMA's own share of supply calculations, we have a contract to supply one major retailer, due to start on the date you see there. It's equivalent to that number of kilo tonnes and that's an important number to bear in mind, it's a very substantial figure. The point is made about the ability to supply a further contract which you see in the second sentence after that and how big that contract would be.

There's an estimate then of the unused capacity that Bells has and that's estimated there and you see the figure, to give you an idea of the extent of the spare capacity that Bells has, even after it satisfies the very substantial contract that it has with a major retailer.

Then what could Bells do with that spare capacity that it has, even after this very large contract with a major retailer? We have the options. It gives you an idea of how that spare capacity could be used, both in relation to the retailer with which it has the major deal but then this at (ii). You can see, first of all, the extent of the spare capacity and how it can be deployed for other major retailers. We see the needs of those other major retailers and the size of their requirements, relative to the very large contract that you have seen earlier because they are not identical. Even then, Bells is left with spare capacity.

So we move on then to page 247. We are moving away now from capacity, spare capacity to perception, retailer perception. We see the retailers that regard Bells as being a supplier, potential supplier of private label products. We see, 9.184, one

retailer is mentioned that does mention Bells as a main supplier. 9.185, we can skip over because, well, that's obvious.

Then 9.186 is important because here we have a retailer saying it has limited interactions with Bells but from its understanding, it has a particular view of Bells' capacity. The point I will be coming back to is the CMA saw that that was an error. Whatever its perception of quality or anything else, in terms of capacity, the CMA understood that that was not a proper understanding of the capacity that Bells actually had to offer. Then we have in the middle of 9.186, another retailer which had considered Bells previously but had preferred Cérélia.

Then at 9.187, a further retailer that holds tenders for its products lines and if you skip down to the next sentence, third and fourth lines, the third and fourth line of 9.187, you see the number of suppliers that are being invited to bid for that retailer's contract that suggests there is competition in the market for private label and Bells is among them.

Then at 9.190 on page 249, we have an insight into the attitude of a further major retailer towards Bells. We see the name of the retailer in the second line of 9.190. There's a mention about how Cérélia views Bells. We are focused here on retailers' perceptions and there's a reference to an internal email, a discussion between the retailer and Cérélia, where there is explicit reference to Bells. And you can see in the rest of 9.190, how the retailer deployed Bells in that discussion. There is a reference, there is a view taken about how the retailer was convincing or not but the proof of the pudding, members of the tribunal, is in the eating. In the very last sentence of that page, we see the impact or we see the result of the discussion between Cérélia and the retailer, in which Bells was invoked.

So we have a substantial proportion of the retailers there, canvassed in this and these findings by the CMA itself. Then I ask you to go over the page to the CMA's assessment on page 250. The CMA's assessment on page 250, paragraph 9.193.

The CMA recognises that Bells is able to meet the private label needs of an additional large retailer. So they have the contract you've seen and they can meet the needs of an additional large retailer. There's further clarity as to how easy it would be to deal with an additional large retailer. But a point is made about that still means Bells has a relatively small market share.

If you skip down to 9.195, the point is made about market share again and the perception by the majority of grocery retailers of Bells as a credible alternative supplier. But you've seen the findings they make about perception. And then at 9.196, there's a reference to a submission made by Cérélia and the fact that the ease with which Bells could use the spare capacity for another leading retailer and the CMA is forced to accept that at 9.197.

9.197 is very informative and it's a finding by the CMA as to how easily Bells could meet the needs of another retailer.

So we have, on the CMA's own case, two large retailers potentially covered to a significant degree by Bells, without material changes by Bells, without inconvenience to Bells. Then at 9.198, notwithstanding those findings, we find the conclusion by the CMA and this is where we say they just didn't step back and rationally reflect on the late evidence that they had gathered because they say, notwithstanding all of that, their conclusion remains the fact that it's a limited constraint and they rely on that purpose, the second half of 9.198. So what do they rely on? The uncertainty around Bells' appetite for further expansion into retail. We'll come back to that in the documents Bells' own evidence contradicts it. Bells' limited overall market position, even if it were successful in winning an additional large retailer. Its market share, as I said how repeatedly, isn't the question. The question is how much spare capacity does it have and can it deploy that spare capacity as a competitive constraint on Cérélia, as a rival private label supplier?

Then finally, thirdly, its perception with customers, how is it perceived?

So dealing first of all with Bells' appetite for further expansion and for that, we'll go to Bells' own evidence which we say doesn't provide probative evidence to support the finding we see here. And it's in my MDB1, tab 66. It is also in the CMA's confidential bundle.

Page 443, please. We will look at question three first of all, on page 443:

"Would you be able to adapt your manufacturing process to produce the products listed above which you currently do not supply and specify which ones and how easy it would be?"

The answer is "Yes", and you see the explanation that they there give.

Then at A, the same page:

"Why have you not adapted your manufacturing process to produce any of the products above?"

And it explains why, for one type of pastry, it's more specialist. It then explains its current position in the rest of that box.

We know the significance of what it can supply from the contract it agreed with that large retailer. But then this at 453; page 453, question 17. Remembering the CMA found there was a question about Bells' appetite for further expansion:

"Do you have current plans to expand significantly your manufacturing capacity in the next 18 to 24 months?"

The answer is "Yes", and the explanation, in block capitals, could not be any clearer.

Question 18:

"Do you have any current plans to significantly invest in new product developments in the next 18 to 24 months?"

So new product development, not just the stuff they are making already. Answer: "Yes".

Then we go to tab 67, also in the CMA's confidential bundle. Tab 67, minutes of a discussion with Bells. Page 458. Just paragraph 3. If the tribunal could read paragraph 3 to yourselves. That provides the evidence on which the CMA made its finding.

I will move on, if I may, to tab 69 now. Tab 69 in the same bundle. This one may not be. Okay, this one does not appear to be in the CMA's confidential bundle. It's in MDB, volume 1, tab 69. It begins at page 467.

MR RIDYARD: I can't find this. It's not in --

MR KENNELLY: MDB1 sir.

MR RIDYARD: Yes, it does not have 69 tabs.

MR KENNELLY: Okay, it's in my one.

THE CHAIR: He is talking about this bundle.

MR KENNELLY: I am told it may be in volume 2 of MDB in the hard copy.

THE CHAIR: Is this page 467?

MR KENNELLY: Yes, it is. Sorry, it may be in your volume 2.

MR RIDYARD: Okay.

MR KENNELLY: Page 467, 25 November 2022. Paragraph 2. If you could just please read that to yourselves, just paragraph 2. **(Pause)**

Then, over the page, paragraph 5. **(Pause)** In paragraph 5, I am relying in particular on the sentence in the very middle of paragraph 5, about Bells' production lines and shifting capacity. **(Pause)**

Whether switching would be relatively easy and quick, one sees that at paragraph 6. **(Pause)**

As to what Bells can do, paragraph 7. **(Pause)**

At paragraph 8, Bells again expresses an interest in shifting to retail but it raises a concern about it doing that for one customer only. But, of course, we are looking

at -- in my submission, the fact that Bells is a constraint because it could offer more than one retailer.

The particular contract with the large retailer they have is described from paragraphs 9 down to 12. I would ask the tribunal to read from nine down to the bottom of 12, in particular -- well, I will wait until the tribunal gets to the end of 12 and then I will make my point. **(Pause)**

In paragraph 12, what's interesting is Bells explains to the CMA what it would ideally like if it were to supply another large retailer, with another large contract and it describes the kind of retailer, the kind of contract that would be ideal for it. And with that in mind, the tribunal will recall the capacity demands that Cérélia estimated the other national retailers would have. The tribunal can see straight away the potential there which the CMA would have seen, based on the information it was getting, that Bells could have to exercise a really powerful constraint on Cérélia and the supply of private label.

Now before I move on from capacity, the CMA's point is that's just two large national retailers. That's limited. My short answer to that is it's not necessary for Bells to have, of itself, enough capacity to wipe out Cérélia entirely. If it had capacity easily to supply two of the four large national retailers, that's a powerful constraint on Cérélia and on the merged entity for the supply of private label.

The next point that was relied on, as you saw in the CMA, was the lack of recognition by retailers that the CMA said, as you saw: well only two retailers really recognised Bells as a viable alternative. My short point there is that's just not correct on the face of the Final Report itself. On the CMA's own findings, a substantial number of the retailers, including large retailers, did regard Bells as supplier. Some of them preferred Cérélia, some of them had concerns but apart from two retailers, there was a high level of recognition and acceptance of Bells as a potential supplier. Of the two that

expressed concerns, one, as the tribunal has seen, had a concern about the -- sorry, that's a different point. One of them had a concern about capacity. One of the large national retailers had a concern about the capacity that Bells had to offer, a concern about whether Bells could supply it. But the tribunal has seen what that retailer's likely demand was and the tribunal has seen what the spare capacity that Bells had on offer also was. The CMA saw those figures and still concluded they could rely on the statement by that retailer that they didn't think Bells had sufficient capacity, even though the CMA knew from the information it had gathered, that Bells had the capacity to supply that retailer.

We say it's irrational, it's not probative evidence, where that evidence is demonstrably erroneous, based on the CMA's own understanding of the facts.

I will turn then to Henglein. The key point here is that Henglein does supply in United Kingdom. It manufactures outside the UK but it supplies within the UK and it has massive manufacturing capacity, far greater than Cérélia. We see that in the Final Report's own findings. The Final Report again, please, core bundle, tab 3, page 259. 259, we see the evidence regarding Henglein and Henglein's production volumes. The second line on paragraph -- I am looking at 9.230, describing Henglein's capacity. You see what their production volume for the UK and mainland Europe is in the second line. They tell the CMA what its maximum capacity is, at the end of the second line. Henglein explains the extent to which it could meet the supply needs of a leading UK retailer in the third and fourth lines on paragraph 9.230.

Just to give an understanding of the kind of capacity that Henglein has, contrast its maximum capacity with Cérélia's production capacity which is described in that last sentence on paragraph 9.230. So there is, as the tribunal can see, a very significant difference between Cérélia and Henglein's maximum capacity.

Then we go on to 9.231. Now this is Cérélia's submission but there's no suggestion

by the CMA that this is wrong. The first point is whether European suppliers face material disadvantages. The CMA has points about that and I will come to them. But then there is a point about the proportion to which DTB products are already manufactured outside the UK. Then B, how Cérélia has fared in tenders against Henglein. You see that at (i) and (ii).

If we could move on then, please, to paragraph 9.240 on page 263. 9.240 and I am looking at subparagraph (b), an internal email from 2020. This is dealing with the potential risk that Brexit represents for suppliers based in Europe. It's hardly surprising. So pre-Brexit deal, we have the statement which is confidential, about how the former dispensation was likely to affect EU manufacturers and exporters and then you see the other internal emails later, reflecting a changed view within Cérélia about the impact of Henglein and other European competitors. We see that quoted in (i), at the bottom of page 263. Cérélia's perception of Henglein.

Over the page, (c), the CMA says: well the evidence from internal documents about how competitive they are is mixed. We see that at (i). So this quote at (i) supports our case about the fact that Brexit is less of an issue now, for EU exporters like Henglein. But within Cérélia, there's still a view that they have an advantage which you see quoted at the end of that (i) paragraph. Then at (ii), there is a reference to a tender from a large retailer and there's a reference about price competition. But we see, ultimately, who won that contract at the bottom of (ii), which I pray in aid to support my case that Henglein provides a constraint on the private label supply side, a significant constraint.

Then we turn to the findings. So even on the basis of their own findings of fact, what conclusions does the CMA reach? We see that at page 264, the same page, paragraph 9.242. They refer to Henglein's market share developments. But as I have said now repeatedly, market share isn't the key, it's not the full answer, it's about

capacity and the willingness of retailers to switch, if Cérélia were to raise its prices. 9.243, there are gaps, some evidence suggesting gaps in the range but it offers the main DTB products. We've seen Henglein's willingness to engage in new product development, in its own questionnaire response. Then paragraph 9.245, the CMA considers Cérélia's submission about Henglein's competitiveness to rest on mischaracterisation and they say:

"We note the key grocery retailers, comprising a large proportion of the market [notably those two], don't consider Henglein a credible alternative for different reasons."

Now just pausing there, the fact that two of the large four don't consider them, even if that's right, and I will come back to that, if, as is clear, Henglein can come in and win the business of the other two large retailers and significant business from other slightly smaller retailers, that's on any view, a significant constraint on Cérélia's ability to raise prices in the market. As I have said in opening, it's not necessarily -- for a significant constraint on Henglein and Bells' part, it's not necessary to wipe out Cérélia entirely but a combination of Bells and Henglein could do that, as we see, based on the findings the CMA has reached itself.

The approach the CMA took in this regard of Henglein is even stranger because of the way they found it. I will just give you the references, in view of the time. In their provisional findings, the CMA said that Henglein was exercising, although admittedly on a provisional basis, a significant constraint. But in the Final Report, they appeared to backtrack from that and found: well, ultimately, the constraint that Henglein is offering is limited. I will give you the references. The provisional findings at 9.199. That's core, tab 10, page 636. The Final Report, well, you've seen 9.246, core, tab 3, page 266.

We just don't understand how the CMA moved in that regard. The evidence that it was getting demonstrated, as I have shown the tribunal, just how powerful a constraint

Henglein was, even if one or two of the larger retailers did not consider it a credible alternative.

Those are my short points on the constraint that the other PL manufacturers offered Cérélia. The last point under this ground and that's the irrationally broad nature of the SLC finding itself, because the CMA decided that the SLC finding applied to all dough-to-bake products. But not all retailers stock both private label and consumer branded products or private label and consumer branded products in the same sub-category. The evidence is that overlap is the exception rather than the rule. It affects about a third of sales and the CMA doesn't explain how this rebalancing threat works, if retailers only stock one or the other. They are applying this implicit rebalancing threat across the entire market, even to retailers that don't stock both.

Now this is barely addressed in the skeleton argument. We'll see how Mr Palmer develops it and I will respond.

The second part of my ground one is the irrational nature of the investigation. Again, I shan't repeat what's set out in the skeleton. There are two main points here and the first I have been canvassing as I've gone through ground 1A. On Bells, the CMA was investigating two things: Bells' credibility and Bells' capacity. As I have said already, the CMA accepted evidence and relied on evidence that Bells lacked credibility, without saying: hang on, retailer, you say Bells lacks credibility but are you aware that they have just secured a very substantial contract with another national leading retailer? It doesn't even have to name the retailer to say: does that change your perception?

The information they are getting from consultees has to be properly informed, if it's to be relied upon and they did not say to these retailers, who are saying: well we think Bells lacks credibility: would your view change if we told you that one of the major national retailers has just awarded Bells a very significant contract?

The CMA also accepted evidence that Bells lacked capacity. As we saw in one important case, one retailer, a large retailer, says: we don't think Bells have capacity to service our needs. Any rational investigator conducting a rational investigation would say: you say that but are you aware that they have significant spare capacity, as demonstrated by a contract they've awarded to another national retailer. Does that change your view? To put these points to the consultees, upon whom so much reliance is placed, they had a duty to do that as a rational regulator and they failed to do so. It's a very short point but it's a very important one. We see how much weight they placed on the retailers who believed Bells lacked capacity and lacked credibility.

The second main point was that when the CMA ran that last minute consultation you've seen in the pleadings, we say it was selective. It only focused on those retailers who were not supportive of the implicit rebalancing -- sorry, focused on those retailers who were supportive of the implicit rebalancing -- sorry, I will make sure I have the right reference.

I am conscious of the time and so I want to give you references rather than take you through all of the pages. In our skeleton argument, it's from paragraphs 36 to 39. And the cross-references to the application and the defence are in that part of the skeleton.

We say that in the way they formulated the questions and their approach in the last minute consultation, it was designed to favour the theory of harm that they had proposed and did not pursue opposing views.

Now in its skeleton, the CMA cites its investigative discretion but, again, that's no answer. As the chairman put to me earlier, there are some regulators, some judges, some individuals, who have some confirmation bias. It's not the same as bad faith or anything like it but the CMA is under a duty, as a rational regulator, to keep its mind open and to seek evidence in a balanced way, in order to achieve a probative evidence base upon which to base its decision.

I am going to move on, if I may, to ground 2 and the fact that the remedy is disproportionate. My short point here is that the remedy is disproportionate because it extends significantly beyond the alleged scope of the alleged SLC. As the tribunal has seen, the remedy requires Cérélia to divest the entire Jus-Rol brand. That includes Jus-Rol's activities in the Republic of Ireland and its activities in the food service and food manufacturing segments.

But neither of these, the activities in Ireland or the food service and manufacturing segments, are alleged to give rise to any competition concerns at all.

Now divestment, as the tribunal knows well, is a weighty matter. The applicants have rights under Article 1 of the first protocol of the ECHR, imposing a requirement that a divestment remedy like this must be proportionate. I am not going to take the tribunal back to Bank Mellat, you've seen it many, many times, but the tribunal has the test well in mind. Ultimately, it's a question of substance for you, as to whether the remedy is proportionate or not, bearing in mind the margin of appreciation that the CMA enjoys. But it's fundamentally important that if a remedy like divestment is to be imposed, it must be shown to be the least intrusive measure required to secure the objective. The reference in Bank Mellat, it's authorities bundle 2, tab 23, page 931, at paragraph 74.

I will begin, if I may, with the geographic scope of the remedy. So Cérélia proposed to the CMA that it should sell the Jus-Rol brand in the UK only but retain it in Ireland, in the Republic of Ireland, where no competition issues were identified. But the CMA dismissed this alternative on the basis of what they say were risks to the UK buyer of Jus-Rol to its effectiveness as a competitor; that if Ireland isn't included, the Republic of Ireland isn't included, that creates a risk for the UK buyer who buys Jus-Rol in the divestment. We see the reasoning in the Final Report again, tab 3 page 382.

I am looking at paragraph 12.83. So if the tribunal could read 12.83, please. That's

the first reason that the CMA gives for the geographic scope of the remedy. **(Pause)**

So the CMA agrees with Cérélia that the dough-to-bake market is national and that these products are used in people's homes. Obvious that the consumer in Great Britain wouldn't buy dough-to-bake products in France. But they say buyers, customers in Northern Ireland, part of the United Kingdom, might also buy Jus-Rol products when they shop in the Republic or because retailers in Northern Ireland might import from the Republic and that would cause confusion.

But there's absolutely no consideration of how widespread that kind of cross-border purchase might be, nothing. Again, it's not an onerous obligation to dig a little deeper and ask how likely is it, how regular is it that consumers in Northern Ireland buy dough-to-bake products in the Republic. Anecdotally, shopping is normally the other way round. But there's no consideration of that and no consideration of any of the harm, of the confusion that would result from any kind of cross-border purchases of this nature.

If there was some product diversions, would that cause any harm at all? There's just nothing, there's just an assertion. Bearing in mind that it's a big thing to say to Cérélia: you've got to sell Jus-Rol in the Republic of Ireland, as well as the UK, with absolutely nothing to show this really is necessary for the divestment remedy to work, apart from these assertions.

The second reason is at 12.84, if the tribunal could read that. **(Pause)**

The suggestion seems to be that because Northern Ireland is small, it might be less attractive for the new owner of Jus-Rol to supply Northern Ireland. But we see that the Republic of Ireland accounts for that percentage of Jus-Rol's business sales anyway. Even on the face of this paragraph, it isn't clear how they could say that this would somehow deter or inconvenience the new owner of Jus-Rol in a divestment. There's no analysis of whether there are any logistical advantages in supplying both

Northern Ireland and the Republic of Ireland. We have the point that it's a single market, post Brexit deal, trade can flow freely across the border, but that can't be enough, of itself, to say in this case, it would make the Jus-Rol divestment less attractive, materially less attractive, in order to require Cérélia to divest the whole of the Republic of Ireland as well, even when no problem has been found in that jurisdiction.

Then we see the fourth reason in paragraph 12.85:

"Split control between Northern Ireland and the Republic would potentially cause inconvenience to retailers that are present in both."

There is a reference to a retailer synergising between Northern Ireland and the Republic and there's a finding that separating them into separate businesses might make Jus-Rol UK a weaker competitor. But in response to this, Cérélia told the CMA how the Republic of Ireland business is run by Jus-Rol anyway and you see that confidentially redacted in 12.86.

That is it. That is the this reasoning that justifies forcing Cérélia to divest Jus-Rol for the whole of the Republic of Ireland. That reasoning is so thin as to be non-existent and no basis for requiring Cérélia to sell its Irish business, on a proper proportionality analysis. That fails to meet the rationality standard. It's speculative, it's inadequately reasoned and it's not supported by evidence. That, we say, affects the broader remedy. This isn't our sole concern about the remedy and we set out in our Notice of Application the other aspects of the remedy that we say are unlawful.

I will move on, if I may, to ground 3. There is the ground that the CMA failed properly to consult Cérélia and that its investigation was procedurally unfair. I am not going to spend too much time on this ground because, first, much of the underlying material has been covered and, secondly, we are giving the tribunal the table anyway which will address these points and will also have the CMA's comments. But the basic point

is that the CMA failed to disclose critical material to Cérélia at the investigative stage, including the retailer questionnaires, the retailer evidence. The material I have been going through at great length, we didn't get it at the investigative stage.

Now the parties agree on the law. I am not going to take you to the authority, BMI, authorities bundle 2, tab 24, and the tribunal ultimately decides what is or is not fair. The CMA's view is given weight but fairness is a question for the tribunal and we are supposed to be provided with the gist of the case against us. And as the tribunal found in BMI, what constitutes gist is context specific but competition cases are redolent with technical and complex issues which can only be understood and challenged when the detail is revealed.

Your task is to look at the representations that we've made in these proceedings in relation to the previously undisclosed material and ask: would those representations have been different if we had been given the material that the CMA took into account during the investigation?

THE CHAIR: It's not as simple as that but, ordinarily, in these cases, you are not provided with things like the questionnaires and the answers and you are provided with the gist and you are given quite a lot of information in the provisional findings. And that what happened in Tobii was a similar case was being run that you ran and then when we looked at the underlying evidence, we found that the underlying evidence had been fairly summarised by the CMA. So at the end of the day, we rejected that ground.

What we need to do here is probably a similar exercise which takes time, to see whether or not the evidence was being fairly summarised and a fair presentation of the gist and if there are things which are positively, let's say, misleading or cooking the evidence, over and above what is justified, then it's a matter of concern, not just for this case but for cases generally, because we all rely on the CMA, as with any

regulator, to comply with its duties in putting the case and presenting the evidence in -- that when they provide a gist, it's a proper gist and doesn't, in fact, misrepresent what the underlying evidence is. That's why having your table will be quite helpful to do that exercise, to see whether or not this is a Tobii situation, in which case your point goes nowhere, at least on that aspect, or a different case.

But it's just a task we have to do.

MR KENNELLY: There are two aspects to it. If you are with me on ground one, you've already seen that the evidence which the CMA had wasn't fairly represented in the findings that were made in the Final Report which are the same points --

THE CHAIR: Yes, but what I am expecting from you when I see this schedule, to have at the end of the heading: this is what we say was misrepresented or unfairly presented and then the references. So you will have the quote from your pleadings and your skeletons and the annexes but then also the relevant part of the, presumably, provisional findings, as well as the final findings, because if they have got it wrong on the provisional findings, you weren't given the opportunity to respond.

So just give us all the references and we'll look at it. You don't have time to take us through all of this but, yes.

MR KENNELLY: Yes, that's well understood. I will give you one reference in Meta because the importance of this point is quite often just brushed over but if you ultimately get the material at the end of the day, the CMA says: well they have it all here now, Mr Kennelly has gone on at great length about it, no prejudice. But there's prejudice when you're given material very late in the day because at that stage, the ability to change the CMA's mind is much more difficult. In Meta, there was a nice comment by the tribunal --

THE CHAIR: I have seen Meta. I am not a great fan of that passage but it depends on how you perceive things.

MR KENNELLY: If you are not a great fan, I will not take you to it.

THE CHAIR: No, of course you can.

MR KENNELLY: The point is an obvious one. I don't need to give the tribunal a statement of the obvious which is that it's harder to change the CMA's mind when you get material late in the day and a fair process involves giving us the material, properly gisted, sufficient in advance, to allow us a proper opportunity to change their minds.

THE CHAIR: But the other way of looking at it is that if you take the view that the CMA is a proper regulator, that, by and large, does have an open mind and is willing to change its views between the provisional findings and the Final Report, there are a number of cases where they have done that, that's one thing.

If you take the view that they are not that professional and that they are not fully cognisant of their duty to consider things fairly with an open mind. Obviously, as a judge, you sit in a case and you looked at the material before and you have views, but I have had so many cases where I've looked at it, thought: well it doesn't look that good for one party and then at the end of the day, you reach a decision which is completely opposite to your initial impression.

But there is a distinction because when you sit as judge and you do that, it's not your decision, it's not your initial view, you have not expressed it, it's just something between you and your conscience and how you are going to run the case. But the CMA, they have gone public, they've put it in the report that they provided to you, and you say that it's a lot more difficult for someone to look at it objectively and to reassess. And Palmer will obviously tell me, we are a bunch of professional people, we know what we are doing and we do look at the evidence as it comes through and we just go where the evidence leads us. If it leads us into a different direction to the provisional findings report, then we are big enough to change our view.

But we'll have to come to a view when we look at it.

MR KENNELLY: And I agree, with respect, with all of that, except I am not seeking to and I don't need to impugn the professionalism of the CMA.

THE CHAIR: No, you don't need to but it's how they really are, at the end of the day.

MR KENNELLY: The classic example in this case is how they treated Bells and Henglein. They are human. Having stuck their necks out on a particular theory of harm, there is the risk that confirmation bias can sneak in and Bells and Henglein cries out for an explanation. They had a provisional view, the evidence came in and it was diametrically opposed to it and what we see in the Final Report and you can see them straining to stick to their original view, but the evidence they have to take into account because it's there and we see all the evidence summarised and then we see the conclusion. There's a real rational, logical disconnect between those two things but ultimately --

THE CHAIR: Yes, we'll hear what Palmer has to say on that.

MR KENNELLY: I move on then to my final ground, ground 4. This ground relates to the date of the publication of the Final Report. As the tribunal knows, generally the CMA has 24 weeks to publish its phase 2 decision. It has a power to extend this by a further eight weeks, where it considers there to be, as the tribunal knows well, special reasons why the report cannot be prepared and published within the normal period.

THE CHAIR: Yes, on that one, if we take the view that there weren't special reasons and so they shouldn't have given the extension, your line seems to be that there is no decision at all, it's effectively a nullity and that that is the end of it.

MR KENNELLY: Yes.

THE CHAIR: You are going to have to persuade me on that and give me some authorities that sort of -- maybe there isn't any but you are going to have to argue it from principle, but that's one of the things that you are going to have to persuade me

on.

The other thing I want to see is the origin of the statistic, I am sure it's here somewhere, I didn't find it, of the 50 per cent, because the mere fact they've, on one view, found special reasons in possibly other cases where they shouldn't have done, doesn't help me at all because what matters is this particular case. But it is quite a high percentage for something that what was for special reasons and it may tell us something about whether or not the initial period is the right period but that's for Parliament to -- or someone else, not us, to determine.

But I would like to see the origin of that figure.

MR KENNELLY: Ms Berridge has the reference. We are going to give it to you in a second.

THE CHAIR: I just want to see it in black and white.

MR KENNELLY: The authority for what I am about to put to you is the statute.

THE CHAIR: Yes, okay.

MR KENNELLY: The consequences that arise from our submission are extreme and I will come to why that shouldn't deter you from applying the law, ultimately, at the end of the day. But I don't shy away from that and I will come to that but first, I have to make the point good on the face of the statute itself.

THE CHAIR: Yes.

MR KENNELLY: And in this case, as the tribunal have seen, the CMA published their report in the 32nd week and the basic point here is the decision to extend wasn't justified by any reasons that could be considered special. I will take this in three stages because the tribunal will see --

THE CHAIR: Just come back. If, in fact, you have a merger which is clearly against the public interest and is going to lead to higher prices for consumers and all that sort of stuff, you are saying that if they have given an extension decision that's wrong and

they've extended, let's say, by four weeks and it comes on week four, that that decision goes and that means the consumers are going to be prejudiced. That is the consequence of your submission.

MR KENNELLY: As I said, I don't shy away from that, that's the logical consequence but that shouldn't -- obviously, the CMA pray that in aid but, ultimately, your job, as you know very well, is to apply the law as you find it. You will construe the expression "special reasons" with these considerations in mind, the considerations, we'll come to those. But, ultimately, if that is where you are led, that is the answer and the fact there's an in terrorem: this can't be right because terrible things would happen, can't be the answer. And we've seen it in other cases. It's difficult, I appreciate, for the tribunal but we've seen two recent cases, one of which in which I was involved, one is the Apple CMA case about the market investigation where the CMA made the very same point. They said: this is crazy, this is a technicality about a time limit which is going to stop us from doing a market investigation which could have very serious significance for competition in the United Kingdom. The tribunal said: we don't disagree, we can't disagree with any of your concerns but you've got the time wrong. You have mis --

THE CHAIR: There's a difference, isn't there, between that and this? Because here, if they've made a determination and the question is whether or not, in the light of that determination, your point has legs, another one is to say: well should we be allowed to do an investigation? But there's no finding there, that there is anything wrong.

MR KENNELLY: The reason I offered that example was that's a situation where the strict application of the rules about when things should be done can have negative implications for the public interest.

THE CHAIR: It can but we don't know in that scenario.

MR KENNELLY: I am saying the tribunal in other cases has been faced with situations

where the CMA has said: you've got to construe this differently because otherwise bad consequences could flow. It's a question of construction. It's always possible --

THE CHAIR: It's a question of construction and law, yes.

MR KENNELLY: Obviously, the jurisdiction case, BMW/VW v The CMA, again the CMA said: if you construe it that way, you are tying our hands in a way that's inimical to the public interest and the answer is either the rules change or you apply them properly. But, ultimately, the tribunal has to apply the law as it finds it.

The outcome, if we succeed on ground four, is not in this case, happily, contrary to the public interest because as I've been trying to explain to you, this is not a case where the public interest would be harmed by the merger but I appreciate that's a matter, ultimately, for you. Secondly, this is just one case. If special reasons are construed the way I submit to the tribunal and I succeed, the CMA will exercise more discipline in using the special reasons extension justification in future cases and the harm that concerns the tribunal should not arise.

So coming first to the standard of review itself, may I show you the statute. It's in the first authorities bundle at tab 3, page 15. It's sections 39(3):

"The CMA may extend by no more than eight weeks, the period within which a report under section 38 is to be prepared and published, if it considers that there are special reasons why the report cannot be prepared and published within that period."

So the tribunal's task falls into two stages. First, you will construe the meaning of special reasons or construe special reasons and we say that's a matter for the tribunal alone. Secondly, having determined the meaning, the tribunal will decide whether the CMA's application of that test was rational.

There is a debate between us and the CMA, as you have seen, on who gets to interpret and how special reasons should be interpreted. Now the CMA suggests that the tribunal shouldn't seek to determine the meaning of special reasons because two

arguments in that respect. First, it says the tribunal shouldn't attempt to legislate by paraphrasing or glossing ordinary words and, second, it says that special reasons -- you saw this in their skeleton -- unlike the terms considered in the South Yorkshire Transport v Scott case are -- special reasons is a protean term that doesn't lend itself to any further gloss. So they seem to be moving away from the proposition it's for the tribunal to construe this and it should be construed by you, by reference to its language and purpose.

Now we disagree with the CMA's submission. It's one thing to say the court should not be a legislature and another to say that you shouldn't be able to construe a statutory provision, the ordinary meaning of a word and its proper construction.

Now you've seen in the pleadings that the courts in South Yorkshire Transport and Scott both undertook that exercise but just to cut through all those authorities, we saw the tribunal's judgment yesterday in Dye & Durham which -- I am sure the CMA has it. I will hand it up to you because it contains a nice summary.

THE CHAIR: You don't need to hand it up, just give me the paragraph number.

MR KENNELLY: Paragraph 60, Dye & Durham.

What the tribunal said there, sir, was that it's the tribunal's exclusive jurisdiction to determine the meaning of the provision. It's not the CMA's jurisdiction --

THE CHAIR: Unless Palmer has something up his sleeve, I am not going to change anything from yesterday.

MR KENNELLY: Okay. But to take the second and more subtle point the CMA makes, they say: well the word special is so protean and vague, it's not in a particular category that needs any further interpretation by the tribunal. But we say it's clearly intended to mean something. The statute simply does not say the CMA may extend the period. It imposes a threshold and it's for the tribunal to determine what that threshold is.

So even if the CMA is right that the word special can't be construed to the single meaning that's very protean, it's still a matter for you to determine how it should be applied. There's no scope for them to exercise any discretion in relation to the meaning of the words "special reason". The rationality exercise comes after the interpretive exercise.

Here, the CMA pushes again on the question of consideration. Can I just show you how they put it in their amended defence --

THE CHAIR: On that, you seem to be -- everyone, presumably, will agree Dye, paragraph 60 and that the construction and meaning of a term in a statute is for us.

MR KENNELLY: Yes.

THE CHAIR: But what I think Palmer is saying, I accept that but you don't need to add a gloss over and above what's actually in the statute. If there is an ambiguity or it needs some sort of construction, then that's fine. We should do that. But what he is saying is I think, that we don't need to do that because special reason means special reason and it's not for us to add a gloss, when there's nothing to add to.

I think that's what he is saying.

MR KENNELLY: Yes, we'll see what he says and I will do it in reply. But in the amended defence, the tribunal will see this also, it's not entirely clear what they are saying.

THE CHAIR: He can explain that to us and you can deal with it in reply.

MR KENNELLY: To be absolutely clear about what the job is, the job of interpretation is a job for you and not for them. When they say special reasons doesn't require interpretation, it's really for us. They come very close to saying, effectively, it's for them to construe what is special and what isn't special.

IBA is a good example. May I show you quickly the IBA case, where this attempt to move the interpretive exercise away from the tribunal to the CMA was rejected. I will

be finished by one. I won't go over my time if I do this. It's in the first authorities bundle --

THE CHAIR: Yes.

MR KENNELLY: -- behind tab 12. The statutory provision there was section 33. You see at it at the top of page 490. Top of page 490 is the provision. Very familiar to you. At page 502, you see the court interpreting that section. You see at paragraph 44 they are asking about the state of mind and belief. Because, of course, that section 33 provided that the OFT could make a reference, if the OFT believed that the situation was going to result in an SLC. So paragraph 44 of the judgment, the Court of Appeal is asking what state of mind is indicated by the word "believe", and at 45, paragraph 45, they say it must be reasonable and objectively justified by relevant facts.

Over the page, 46 to 48, there's no need to read all of these. Again, the tribunal has seen this authority many, many times. They discuss the meaning of the things that must be believed, is it -- or maybe the case may be expected to result. The court here is interpreting these terms for itself. It's not saying that the OFT's belief as to the meaning means that the OFT's belief is sufficient, if the OFT forms a view --

THE CHAIR: If they got the meaning wrong, they have a problem, haven't they?

MR KENNELLY: Ultimately, the OFT has an interpretation, we see it in paragraph 49, which they had in their published advice. That is the OFT's interpretation and the court disagrees with it at page 504.

So since it's for the tribunal -- you can put IBA away again now -- to decide how the special reason is to be interpreted, I will turn to the interpretation of that phrase and begin, obviously, with the ordinary words. The ordinary meaning of "special" does not require any explanation. Special is not ordinary or everyday. If I am saying, having a special birthday, it's not my 49th birthday, it obviously requires something different.

The Oxford English dictionary is in the bundle. I will give you the reference, I am not going to take you to it. It's the fifth volume, tab 63, page 4173. So "special means out of the ordinary, unusual, exceptional in quality or degree."

Then we look at the statutory context. Part 3 of the Enterprise Act provides for the CMA's review of relevant merger situations and this is important. It's obvious that you must construe this phrase consistently with the statute. And in construing it, the tribunal will strike -- and sees that Parliament struck a careful balance between the need for the CMA to conduct a proper review and the ability of firms to carry out merger activity in a timely way. We see that all through part 3.

And I will just give you the provisions again. There is a careful timetable governing all stages of the review. There is a longstop date, after which a reference can be made. That's four months from completion. We see that in sections 22 to 24. And there are significant penalties for parties who delay in responding to CMA information requests. The whole statute strikes a balance between the need for the CMA to conduct a proper review, so it can penalise people who delay, but also the ability of firms to carry out this activity in a timely way. So the time limits are strict and the CMA regularly complains, protests about how hard it is to comply with these but they are designed to ensure that parties can carry out merger activities in a timely way. There's an overall duty expedition in the tribunal also when merger reviews are conducted.

It all points in the same direction as the ordinary meaning. There must be something out of the ordinary, unusual or exceptional to justify an additional two months.

Now our application also cited various external aids to construction which we say all strongly support this approach. I will take you, if I may, to the application. I will just show you what they are. I am not going to take you to them in the authorities.

THE CHAIR: You have not found any cases that consider special reason or whatever?

MR KENNELLY: Nothing that would be of any use to you.

THE CHAIR: Nothing in Stroud -- you've looked in Stroud, have you?

MR KENNELLY: We did and we looked in a couple of other legal dictionaries as well. No, what you have is what you have.

THE CHAIR: We have what we have, okay.

MR KENNELLY: If I could show you the application in the core bundle, you'll see these are external aids. There's a dispute between us and the CMA about how admissible they are but nothing really turns on them. Ultimately, it's for the language and the statute but I will show you these --

THE CHAIR: So where are we, sorry?

MR KENNELLY: We are in the application itself, the application in the core bundle, behind tab 1 and it's page 57.7.

Again, the tribunal has looked at this, I am sure, and you will look at it when you deliberate but the external aids to construction are set out here. At paragraph 249, we have the explanatory notes that accompanied the Act. You see what is envisaged to be encapsulated or to be covered by special reasons:

"The illness or incapacity of members of the reporting group that has seriously impeded its work ... an unexpected event, such as the merger of competitors."

So major events.

Certainly something out of the ordinary, something unusual or exceptional. In the White Paper we have at 251, you see we refer to exceptional circumstances in bold. That's what the government had in mind. Then 253, the Parliamentary statement of the response from the Minister. Again, referring -- I am just taking you to the bits in bold -- what was envisaged for special reasons:

"Illness of members of reporting groups."

It's not supposed to be an easy option, it's intended to impose a discipline on the Competition Commission, to ensure that in the vast majority of cases, they are

completed within the 24 week deadline."

Ultimately, there may not be much between myself and Mr Palmer on this because in their amended defence, I will just give you the reference, at paragraph 177(c).2, they say:

"The CMA clearly must have in mind and understand that an extension is not a routine step and requires specific justification in each case."

THE CHAIR: What paragraph is that in the defence?

MR KENNELLY: 177(c) .2. So they accept that it requires specific justification. It should not be routine. But we go further and say it needs to be something out of the ordinary, unusual or exceptional which we say is an obvious interpretation of the phrase, particularly in this statutory context.

Now we come to look at this case and we see the notice of extension in the H bundle, volume three, behind tab 53, page 1136.

THE CHAIR: Sorry, which bundle am I going to find this in?

MR KENNELLY: This is the hearing bundle, volume 3, tab 53.

THE CHAIR: Yes.

MR KENNELLY: We see the reasons for the extension in paragraph 3:

"The Inquiry Group have regard to the complexity of the inquiry, the need to consider the issues raised by the parties and by third parties, including the broad scope of the submissions made by the parties in response to the annotated issue statement and working papers and the need to reach a fully reasoned final decision in the time frame."

There is nothing here to suggest anything special in the fact that the parties responded to the annotated issue statement and working papers. That's a normal part of the process. The CMA's skeleton, paragraph 55, says it was the volume and complexity of these materials that prompted the decision to extend.

Now I am not asking the tribunal to count the pages or work out how complex this is. You can see it in the administrative process between tabs 24 and 48 in the second hearing bundle. My point is that merger inquiries are complex by their nature. They raise complex issues. They always involve a forward looking assessment, sometimes of multiple markets and often through multiple theories of harm, which is not this case. There is a consultation requirement in every case and the CMA is held to a high standard in support in every case. All of that is built into the timetable provided by Parliament.

Now on its side the CMA has a substantial period to make inquiries and reach a decision. The tribunal knows it has powers to require the provision of information and it can stop the clock if they are not received. It has a team of expert staff. It has lawyers, economists. For the CMA, complexity is part of the day job. That is the ordinary and everyday reality of merger cases in the CMA. They can't say that complex and voluminous submissions are exceptional or unusual. Indeed, it has never said that.

We just don't see where there is a reason suggesting that there was anything special justifying this extension. These reasons don't have any quality of exceptionality. There's nothing unusual here which is required in order to rely on the special reasons extension.

So for that simple reason they fail the rationality test. They have not rationally provided you with information to justify their reliance upon the special reasons requirement. It just isn't here. It's a very simple and short point. The key concern I think the tribunal has is the consequences of my construction and my argument in this case because the CMA, as the chairman has said, says: well, this means the tribunal will overturn the Final Report, even if all the conclusions in it are unimpeachable.

THE CHAIR: Yes, but let's look at one -- you are saying there's nothing unusual to

get voluminous submissions or whatever. Let's say that it becomes the norm for the CMA to be presented with masses of submissions and material to look at and 50 per cent of the firms in this area of business, that's what they do, they send masses of stuff for them to go through. Are you saying that if that does happen and it's the sort of volume of material you can't reasonably expect the CMA to absorb and come up with a proper decision in the light of that within the period, that that can't amount to a special reason?

MR KENNELLY: No, on the contrary, if the CMA does receive in a case, an exceptional and unusual volume of submissions, something out of the ordinary --

THE CHAIR: Yes, but what I am saying is if it becomes the norm --

MR KENNELLY: Sorry. If it becomes the norm, it's happening in every case?

THE CHAIR: Not every case but a large proportion of cases that people are doing this and just swamping them with a mass of material to go through. One of the problems with litigation is that you telescope things and it's as if the only thing that people have got in their life is your particular file in your case and that's not in the real world. People have lots of other things to do and there comes a point where there is so much material that in order to do a proper, professional job, they need more time. Whichever way they go, they could be criticised because on one level, if they don't deal with everything, they will be criticised for doing that, if they don't deal with everything and they get the report out on time. Or if you do the other way round, they will be criticised for not dealing with all the submissions because they will say: well the Final Report hasn't dealt with this and hasn't dealt with that.

What I am seeing is the reports of the CMA seem to get longer and longer. I don't know whether it's just my perception but having done this since, I don't know, God knows how long, but the reports seem to get longer and longer over time. So my question was, if it does become the norm for people to give masses of material for the

CMA to consider and it's just not practicable for the CMA to do it within the statutory timeline, are you saying that that can't constitute a special reason on an individual case?

MR KENNELLY: In that scenario, I am saying, yes, you can't, because there are two answers.

THE CHAIR: Yes.

MR KENNELLY: The first is if it becomes a norm, then by definition it's not special. There's no -- the CMA can't say in every case there are special reasons here that require an extension. If it becomes the norm that in general the CMA simply doesn't have the time to do its job properly because of the volume of material it's receiving, then the times have to change, then Parliament needs to legislate to extend the times and to readjust to reflect this new reality of the volume the CMA receives. But what we cannot have is a new reality being shoehorned into statutory language that requires something unusual and exceptional.

THE CHAIR: Okay.

MR KENNELLY: If it becomes the norm, then it's not unusual and exceptional.

THE CHAIR: You only have a couple of minutes. So I will want the 50 per cent reference but you can -- do you have that now? Let's have the 50 per cent reference.

MR KENNELLY: It's in Authorities 5, the fifth volume.

THE CHAIR: Authority 5, yes.

MR KENNELLY: Tab 62A.

THE CHAIR: Yes.

MR KENNELLY: Page 4169.2.

THE CHAIR: Okay. We'll look at that separately.

MR KENNELLY: It's cited in our application as well at paragraph 2 --

THE CHAIR: I have that. One reference is fine.

MR KENNELLY: Okay.

THE CHAIR: Then the next question I have on this is what is the status of the Daly statement in all of this? Because if you are challenging a decision, that is a decision and that is what we look at. If, in fact, Daly amounts to different reasons, then it doesn't assist us in deciding whether or not this decision was right.

If all it does is just explain it and expand upon what they've already got, is that admissible or not? I can see clearly what's admissible. I can see what's not admissible. What I am asking you is -- so if it basically gives new reasons, obviously I am not interested. If it merely gives exactly the same reasons, that's fine, it's neutral. But what if what it does is it doesn't go outside the confines of, let's say, the heads of reasons but it puts more colour and more flesh on the reasons in there? To what extent is that admissible? You can tell me at two but I will want --

MR KENNELLY: To the extent that they are new reasons, then --

THE CHAIR: No, new reasons, that's out.

MR KENNELLY: If they are not new reasons, then it is admissible but the weight you will give it will be a matter for you based on the context in which you review the statement and what it says.

Our position is that we ultimately don't care about this Daly statement because it adds nothing. What is striking in Daly and in the disclosed material that we have from the CMA is how scant the analysis was by them of whether special reasons existed or not; and that is informative because the tribunal is worried about the CMA and how the CMA manages, but it's striking how little thought they gave to whether there were special reasons or not.

The legal advice they got appears to have been about one or two words when you look at -- obviously it's redacted but when one looks at the sentence in question, that's at paragraph 262(d) of our application notice, the CMA has not taken this seriously. It

assumes that it can claim special reasons, even if there's nothing special, and that is where we say the tribunal should step in and say: actually in this case no, it has to mean something. In fact, if the situation now is that in nearly every case the CMA needs extra time, it can't pretend there are special reasons; the rules themselves need to change to accommodate the new reality. That's ultimately the submission that we make to --

THE CHAIR: I can note down there is no challenge in the admissibility of Daly, subject obviously to weight.

MR KENNELLY: Yes. Can I just check I have nothing else.

I am very grateful. Thank you.

THE CHAIR: Thank you very much. If we have any further questions arising from that, we'll put them to you at two but we won't take up too much of Mr Palmer's allotted time. Thank you very much.

MR PALMER: You are intending to sit until --

THE CHAIR: 5 o'clock today, yes. If you need more time tomorrow, we just start early and we finish later. But it's important that you don't feel as though you are being not given your fair allocation of time.

I am unlikely to be assisted by a reply that lasts a long time either. A reply is a reply.

MR KENNELLY: Okay.

THE CHAIR: Thank you very much.

(1.05 pm)

(The luncheon adjournment)

(2.00 pm)

THE CHAIR: Mr Kennelly, we have one more question.

MR RIDYARD: Mr Kennelly, just reflecting on the presentation on the first ground, in your skeleton you make quite a big emphasis on the fact that the two parties don't

actually overlap in what they do, you know, one being a manufacturer, the other being effectively a marketing company. But I just wanted, maybe not now but for when you do get to come back, to reflect on what the full implications are for the SLC concern of that set of facts and, specifically, if you think of the SLC as being a prediction of a price rise post-merger. There is obviously two ways of looking at that. One is the price rise of the Jus-Rol products and one is the price rise of the Cérélia private label products and whether you think this is fact, about the fact the companies don't do the same thing, whether that affects the SLC asymmetrically as between the risk of Cérélia raising price post-merger and Jus-Rol raising price post-merger.

MR KENNELLY: Thank you, sir. I appreciate I am not going to develop the point now but we have made that point in our application and in our skeleton and we stand by it.

MR RIDYARD: Yes.

MR KENNELLY: Plainly (several inaudible words). At one point, sir, you suggested manufacturer to manufacturer competitive tension, as one would see in a classic horizontal unilateral effects case. It's not this case because, of course, Cérélia is providing input into --

MR RIDYARD: I understand that fact and it's a big point in your skeleton but it was just an observation that you didn't make a lot of it in your oral comments and so that's why I would like you to think about that and how it impacts the analysis.

MR KENNELLY: The short point is that when this de-listing or switching volumes situation arises, it's not that the retailer is not shifting between manufacturers, as one would have in this classic manufacturer horizontal competitive constraint case. The retailer is de-listing and switching volumes away from its own product. It's the retailer's private label product it's reallocating on a shelf vis-a-vis Jus-Rol which is the point we made in our application and skeleton but I will come back to it.

The point, if I may, because Mr Palmer, to the extent he thinks he does not have to

deal with it now, he definitely does, it's still part of our case and I will return to it in reply. Thank you.

THE CHAIR: Mr Palmer.

Submissions by MR PALMER

MR PALMER: Thank you very much, sir, members of the tribunal.

During the course of his submissions, yesterday and this morning, Mr Kennelly repeatedly and insistently identified the SLC found by the CMA as depending upon a very particular competitive constraint, currently present, which would be, according to the CMA, removed by the merger.

That specific constraint which he said was fundamental was that at present, retailers could threaten their suppliers of DTB products, even if implicitly, that if they didn't improve their commercial terms, the retailer would switch volumes in whole or significant part, from Jus-Rol to Cérélia or vice versa.

It was from that premise that we were taken on a tour of the evidence from retailers which was said to contain no evidence at all or at least no evidence of any probative value of such threats being issued and no evidence of any probative value, suggesting that such threats were being issued, even implicitly, by means, as he put it this morning, no doubt metaphorically, of a hint, a nod or a wink.

The problem with this account is that it does not, in fact, reflect the basis of the CMA's decision at all. It is a straw man. It is a gross simplification of the theory of harm and entirely artificial in construction.

Mr Kennelly's submissions were pretty light under ground one, in terms of their reference to the decision which is actually the subject of challenge. We spent most of the time looking at the underlying evidence and not what the CMA made of that evidence in the decision. He went, in total, to a very small selection of paragraphs in

the decision at the outset which I am going to take you back to and then I am going to take you through the decision to show you the wider context and how all this played and fitted together.

Now the core finding, to use Mr Kennelly's words, were said to be in the Final Report, in the core bundle, page 143, paragraphs 7.34 to 7.35. This is page 143. This was his introduction to the point, setting up the straw man. Pointing at 7.34, I just wanted to put the point in context, so just to turn back a page or two to page 135. You can see that this chapter is called "Features of the sector and our competitive framework". So that is what is being described. The competitive assessment, of course, is in chapter 9 but nonetheless, it's said by Mr Kennelly that the core finding is here.

Turning back to page 142, just to introduce the beginning of this subsection, it's headed "Cross-channel competition", just above paragraph 7.30. It's from paragraph 7.30 that the CMA describes how cross-channel competition operates, where you see that at least between 70 and 80 per cent of DTB products supplied in the UK are sold by grocery retailers that provide both PL and branded products. Retailers have told us they have a finite amount of shelf space and they have to decide how much will be allocated to the PL and branded channels across the product range. And then we have some evidence in support of that statement at 7.31, 7.32, 7.33. I am not going to read all that out, the tribunal will see it.

Then what's said to be the core finding, 7.34:

"As such, there is an ongoing process [and I ask you to mentally underline the words 'ongoing process', we'll come back to that] by which retailers select their optimal volume mix."

Footnote 228:

"Volume mix and shelf space can be used interchangeably in this context, on the basis that more shelf space is typically allocated to better selling products ..."

So optimal volume mix of PL and branded products, based on the offerings of suppliers:

"... to best serve their end consumers and their commercial interests. We refer to this mechanism as rebalancing or flexing between PL and branded products."

Just pausing there, there's no reference there to any threatening. It's simply saying: retailers look at the offerings before them and decide what the optimal volume mix at any one time for them is, so as to best serve their end consumers and their commercial interests.

Just pausing there, that reference to commercial interests in this context needs to be read with what has gone before at page 137, in the section headed "Grocery retailers' purchasing decisions".

Retailers told the CMA that their decisions whether to stock PL products, branded products or both and how much of these products to stock, are driven by a number of commercial factors. 7.8:

"Grocery retailers' purchasing decisions are informed by what their customers, end consumers, want to buy."

Mr Kennelly showed you that paragraph. I need not read it all again but clearly it's making clear that grocery retailers are responsive to the demand preferences of their end consumers, based on what is being bought at retail level and that that generates a response, as retailers purchase more or less at the wholesale level:

"As a result [7.9] the CMA is of the view that competition at the wholesale level is linked to the competitive dynamics at the retail level. That is the demand for DTB products at retail level significantly influences the amount grocery retailers purchase at the wholesale level, ie derived demand."

7.10:

"However, retailers' decisions about which DTB products to stock and the volume they

purchase are also informed by broader commercial and strategic considerations, including the shelf space available, how profitable selling product is for the retailer, given the retail margin they want to achieve, the desire to provide their end consumers with choice, some retailers do, some retailers don't, and the importance that they place on innovation, new product development 0and market campaigns which may help to generate interest and growth."

Going on, 7.11, we can see the big four generally choose to stock both, to give end consumers more choice. There's an explanation as to why. At 7.12, there's an explanation that others don't and prefer stocking PL products in some cases, others sell branded DTB products but there is some fluidity, even there. At 7.13:

"Retailers that stock both will not necessarily do so across the full range of products and regularly change the amount of product they purchase across each of the channels over time and may even stop stocking one or the other entirely if it's selling poorly or not meeting their commercial requirements."

That's a de-listing event. That's at the extremes. What is more common is this rebalancing and flexing.

So most retailers that stock both indicated they didn't have a particular preference for one over the other.

So if we go back to the bottom of page 143, we've got to over the page to 144, the second paragraph which Mr Kennelly identified as core. 7.35 is:

"DTB suppliers will consider the impact of their offering across PQRS on expected volumes which, in turn, drive profits."

Just pausing there, we're not talking about retailers here, we are talking about the suppliers, in formulating their offering across price, quality, range and service they are going to provide on expected volumes, ie what volumes they are going to get from the retailers. They are incentivised to provide the retailer with a good deal because if the

supplier does not, the retailer may switch to another supplier for that channel or subsequently allocate more shelf space to the other channel. That's my point, 2.30 footnote, at the extreme, de-list their product and decide to only stock the product via the other channel.

There's an example given during a tender or a renegotiation of a PL supplier offering, it's constrained not only by any risk that it will be replaced by an alternative PL supplier but also by the prospect that if it remains the selected PL supplier, it may lose sales to the branded channel. So as a result, there's competition between DTB suppliers not only within the PL and branded channels but also across the channels. I emphasis that word risk because subsequent references to the use of the word threat by the CMA, as opposed to the parties in their submissions to the CMA, mean in this context, that risk. It's a perfectly ordinary dynamic between two essential choices which is made on an ongoing basis and flexed on a regular basis between two competing offers, as to what is going to serve end customers best and serve the retailers' own commercial and strategic priorities best. That will change over time, depending on the offerings. The suppliers will bring those offerings, try to make them as attractive as possible because they want to maximise their volumes at the wholesale level. Whether or not they are successful will depend on the PQRS and what retailers predict the effect of that offer will be at retail level, once they've added their margin and any promotions and all the rest of it. It's a perfectly ordinary, unexceptional retail dynamic, with wholesale supply being brought in, competing on that basis.

That is the core finding. You were told consistently that the core finding is based on the ability to threaten, independently of anything which is happening at retail level, in terms of derived demand, independently of anything which is more or less attractive about the price, quality, range, service dimensions of the wholesalers' offering. So when we went through all those documents, repeatedly Mr Kennelly's submission

was: well, look, that's just about derived demand, that's about retail demand, that's about the quality of poor performance, it's not about any threat being issued, either expressly or impliedly. It's a fundamental misunderstanding and mischaracterisation of the theory of harm. I am going to go on to show you the other paragraph which Mr Kennelly referred to but what you've been sold in the retail offer that Mr Kennelly makes to you is a submission which mischaracterises the basis upon which the CMA proceeded. It's been a consistent mischaracterisation all the way through, to be fair to Mr Kennelly, his clients' submissions to the CMA.

I will come in a moment to why that is and in fact it reflects the point raised by Mr Ridyard a moment ago about the different analysis which underlies all this, about whether or not there's horizontal competition at all. I will come to that. Essentially, the parties' consistent position throughout this investigation has been: we are not horizontal competitors, there's no horizontal competitive dynamic. We do not compete against each other, so we are not constrained by ordinary forces of competition you would find in a horizontal set up. You, the CMA, need to find a theory of harm which works in a vertical context, they say, and that's why they try to channel all of these concerns into this straw man of a theory that what the CMA is really concerned about is explicit or implicit threats outside the context of that perfectly ordinary competitive retail dynamic.

The CMA, for one, is not buying that and invite the tribunal not to buy it either.

So going on within this section, that is where Mr Kennelly terminated his consideration of what he called the core findings but it continues, at 7.36, to make this explicit:

"As established in our guidance, the CMA views competition as a process of rivalry ..."

Remember I emphasised earlier the ongoing process referred to at 7.34:

"... between firms seeking to win customers' business over time, by offering them a better deal. The competitive tension between DTB suppliers, whether within or

across the channels, therefore incentivises them to cut price, increase output, improve quality, enhance efficiency or introduce new and better products. The supply process outlined above illustrates that there are periodic opportunities for suppliers to improve their offering for the terms included in supply agreements, eg price and quality, at that point in time, but efforts by suppliers to more generally boost their efficiency, enhance the quality of their products and innovate to introduce new and better products, constitute an ongoing process which drives better outcomes for customers over time."

To believe Mr Kennelly, the CMA is only concerned with what is happening within the limits of a specific negotiation, a specific point of time and is looking for specific threats: give me a better deal or I will go elsewhere, regardless of the dynamics of this underlying -- dynamics of derived demand and what consumers want and everything. That's not the theory of harm. It's not based purely within the confines of the negotiation room or negotiations over the phone, as they may be.

It is a wider dynamic, in which, as you've seen some of the internal documents reflecting, the parties were concerned to improve the offering and to win back market share, Jus-Rol's case, from the PL channel or vice versa by improving their price, quality, range, service and by considering what they can offer retailers. That's an ongoing process happening all the time, not just when a negotiation comes up.

In that context, can I take this opportunity just to answer a question raised yesterday morning by Mr Ridyard about to what extent a wholesale price is fixed and when these opportunities do come up, because the impression may have been given that PL operates on a basis of periodic tenders and so won't come up for a year or two and so forth. That's not the position.

Page 139, paragraph 720. It's headed "PL supply process: "

"Cérélia told us that negotiation of pricing and terms for the PL DTB products ... "

And you can see there is a reference to what is typical at the bottom of that page,

rather than the other option given:

"Cérélia told us, to the extent it is aware ..."

You can see who and what is done, as far as Cérélia is aware.

"... and that this was corroborated by third party evidence and they told us that other retailers ..."

So that's everyone but those -- you will see the extent to which the big four in particular operate those processes referred to.

Instead what they do is set out in those last three lines at paragraph 7.20, and you will see the last four or five words of that sentence. Then at 7.21, by whatever process they followed, they will enter into a supply agreement which governs the relationship and that will typically cover wholesale price, et cetera, but not supply volumes. So wholesale prices are therefore, to an extent, fixed until there is further renegotiation and change to the supply agreement but the volume of products always fluctuate. So you would expect the wholesale price to be fixed but you will have seen from 7.20, the circumstances in which that can come up for review and on what basis.

MR RIDYARD: I am sorry, does it -- so can Cérélia change the price of a private label product whenever it likes or does it have to wait until the end of the contract?

MR PALMER: As I understand it, there's provision under the contract in certain circumstances for the price (inaudible), although I understand also that's rarely used. The question is, how long is the supply agreement going to last and in what circumstances can it just be brought to an end? And the answer to that question you'll find in 7.20. You will see that at 7.22 and that's where GSCOP comes in as well and you can see that there is periodic reviews. So that's different from the term of the contract and if they are unhappy, they can choose to renegotiate that, either through a tender process or a bilateral renegotiation of the terms, as at 7.20. At 7.23:

"Some retailers will simply conduct bilateral negotiations with their supplier, if they find

the terms of their agreement don't meet their needs."

You see what else is said there. So that's the answer, I hope, to Mr Ridyard's question about that. I am just going to return though, to the point I made at 7.36 which was at page 144, where you will remember I was making the point this is not limited to the negotiations at periodic opportunities, whenever they are, that the competitive dynamic is an ongoing process and both suppliers being incentivised to compete constantly and they are, at retail level, directly competing in the supermarket aisles, as I understood Mr Kennelly to accept, indeed that is conceded by the parties during the investigation, and by virtue of the derived wholesale demand, they are directly competing for volumes at the wholesale level too. Now there was some suggestion, both in the skeleton and Notice of Application and in Mr Kennelly's submissions to you, that the CMA have found that the parties don't compete directly at wholesale level.

That is not correct. What they find is they don't compete head-to-head in a tender exercise, in other words when there is a tender exercise, it's exclusively in the PL channel and the branded producers don't compete in those head-to-head tenders. But it's not right to say that there's any wider finding of a lack of direct competition. They are directly competing at retail level and because of the relationship at wholesale level, they are directly competing with each other, as the underlying documents reflect, in terms of attracting volumes on a wholesale basis.

Indeed, a slight diversion but there's time for it. In the hearing bundle 1, tab 7, you'll find a merger notice submitted in March 2022 by the parties and if you turn within that to page 196, paragraph 419, you'll see the parties' description of the process at this stage. They said:

"Retailers must decide the mix of branded and own label sales at their stores, taking into account the preferences of the consumers they are competing to serve. So, for example, retailers can vary the level of promotional activities they undertake for these

products. They can also vary the shelf space allocated to branded products, the prominence of the positioning of the product on shelves, the volume of branded products they purchase and/or the range of products they purchase from the brand. Retailers can selectively de-list branded products, where either the own label equivalent or a competing consumer brand is performing well or better than the brand in question. Retailers commonly refer to this as removing 'duplication'. Where a branded product is not bringing value into the category and is outperformed by the own label equivalent product, retailers would remove the branded product to free up space for a more profitable product, eg for own label, another brand or an adjacent category."

Then there are some examples given of various de-listing occasions of Jus-Rol's products which are confidential but that is, as I said, extremes but there are there some examples they give at that point.

The point is there is that direct substitution going on at wholesale level, reflecting the competition which is being played out at retail level and that is as obvious, as it ought to be uncontroversial.

So this is what then -- this dynamic is what the retailers described as giving rise to an implicit competitive tension, was the way they most frequently put it. The incentives for both suppliers to do their best, effectively, to win most volumes over time through that process.

Now to the extent that tension is described as a threat, the threat they face is not a literal threat, with menaces or otherwise, as in a demand delivered across a negotiating table, that they must cut their price or the retailer will switch, regardless of anything else, as if in a vacuum. Nor is any such threat delivered implicitly. It's the risk that if they are not doing well enough with their offer, they are just going to sell less volume.

No such threat of the type which Mr Kennelly said was fundamental to his case has been claimed by anyone. The implicit threat is the risk referred to by the CMA at paragraph 7.36. If your commercial proposition, taken as a whole, is less attractive, that's likely to affect the volumes that the retailer will buy. Retailers are, as Mr Kennelly frequently emphasised, very sophisticated operators. They know that if the offering is degraded in price or quality or falls behind in innovation, that will affect their volumes at retail. That will affect their volumes of their wholesale level in consequence and so too will the broader commercial strategic considerations which I showed you at 7.10.

If we go in the core bundle to page 221, these are the paragraphs 9.101 and 9.102 that Mr Kennelly belatedly showed you this morning and ignored them completely yesterday because he wanted to suggest today that these were two different theories of harm, that 9.102 was a bit of a bolt-on, a bit of an afterthought. Again, that's a misdescription of the context and the effect of them. These paragraphs appear in a section of the competitive assessment which begins at page 215. This bit is responsive to the parties' views on our assessment of competition between them. So we've already gone through the assessment and I will take you through the assessment earlier, in particular the assessment of competition and the closeness of competition between the parties.

The particular submission which is being responded to here begins on page 220 which is that retailers are unable to exercise constraint, that's the headline, then you see the parties' submissions, where you see Cérélia submitted that any volume flexing between the parties is driven by consumer choice. It's said that:

"Any attempt by retailers to ignore consumer demand would be irrational, to seek to defeat a small significant price by reallocating volumes. Typically, more expensive for both retailer and customer. GMI submitted that retailers bouncing their portfolios between branded products is not evidence of competitive rivalry, influenced by product

demand."

This is all part of the story that the parties were telling throughout which is you've got no ability to threaten, everything is being driven by consumer demand and you have no control over that.

Our assessment, the CMA's assessment begins at 9.99. It refers back to section 7 and we'll go to that specific paragraph in a moment in fact. But making the point that the wholesale level, retail level is linked to an extent. Even if the competitive dynamics are not identical, there are other considerations at play:

"The CMA considers that Cérélia's characterisation of the nature of the constraint is overly narrow, being based on a relatively static assessment of only one of multiple parameters of competition and inconsistent with the evidence available to the CMA on competitive dynamics."

9.100:

"In this regard, the majority of grocery retailers responded to ...(Reading to the words)... viewed the party as competitors."

I repeat we'll come back to this, but at this stage -- and perhaps still, I don't know, in light of what Mr Kennelly said just now -- the parties were contending they weren't even competitors:

"The evidence supports the view that retailers flex their purchases to reflect price and quality. In this context in particular, the parties are material competitors."

That explains why.

It tells us the parties compete for volumes purchased by them which they use to drive down prices, alongside other factors:

"We have found that it's possible for retailers to adjust the share of their shelves allocated to PL and branded. [This is all going to ability to constrain]. While the preferences of end consumers are an important factor, retailers take into account

various commercial considerations, such as which supplier gives the best offer on cost of goods. Regardless of whether retailers pass on a wholesale price increase to their end customers, we have found that their optimal shelf allocation across PL and branded products will shift away from the channel which deteriorates its offer. In addition, we have found evidence that retailers adjust their mix between PL and branded products to reflect anticipated end consumer demand and we consider that this will include their anticipation of how retail demand will change, in response to a deterioration in the offering across PQRS. In this way, the link between end consumer choices and the demand of the retailers is a key driver of the rebalancing constraint between the parties. That is the parties have an incentive to keep their supply offers competitively priced, as there is a threat, in the sense of risk, that they may lose volumes and sales to the other channel if they deteriorate their offer. We therefore conclude that the evidence supports the view that the parties exert a material competitive constraint on each other."

This notion that the CMA is relying on some independent threat being made, is without basis. And the notion that the CMA is not relying on these underlying retail trends and responses to changes in price, changes in quality, changes in range over time, to drive their wholesale demand and that's affecting the negotiations, affects how they respond to whatever offer is put to them in a negotiation. They will anticipate what effect that will have. Precisely the way Mr Ridyard put to Mr Kennelly yesterday morning. Mr Kennelly's response every time was: that is not what the CMA found, you have to look at the SLC, as they identified it and they identified it as specifically lying in the ability to threaten independently of retail demand, independently of these types of dynamic which were being expressly described here. Again, this is without basis.

So again, looking at that risk or threat, that parties may lose volumes in sales to the other channel if their offering is not good enough. The next point is, as the CMA found,

that's a point of which the parties are well aware. Which is, the CMA found, precisely why they benchmark themselves against each other and monitor each other. You see the significance of that at 9.103, the following paragraph:

"With regards to price competition specifically, not the only dimension of competition but the CMA considers that regardless of the price differential in absolute terms, there is strong evidence of competitive benchmarking on the relative prices of the parties' offerings. Branded products are compared to PL products for retailers to assess whether the brand margin or brand equity relative to PL products can be justified, given their closeness in product functionality. This means that there is material competition on price between the parties, notwithstanding some difference in absolute pricing. For example, Jus-Rol internal documents monitor the indexing of the retail pricing of their products compared to PL alternatives and [confidentially marked] take that into account as well.

"We consider this is directly relevant to the relative pricing of the wholesale offering each supplier makes to grocery retailers which is the only direct commercial channel through which the parties distribute their products. It's ultimately because they are close substitutes, with a lack of alternatives, such that if the price in one channel were to significantly increase demand will switch to the other channel."

Now that is why the parties benchmark themselves against each other, monitor each other and that conclusion is based on evidence -- I won't go through it now, we will look at it later but for your note -- in the report from 9.75 through to 9.89 and there are conclusions -- we have to turn those up -- in the assessment at 9.91 on page 214. Take it from 9.90 perhaps. This is the sentence, based on the evidence and the paragraphs I have just referred to you:

"Consistent with our understanding of the market, parties monitor each other, regard each other's competitors ... Particularly strong evidence that GMI regards PL products

as the primary competitive constraint. The CMA notes that Cérélia monitors PL suppliers more frequently ...(reading to the words)... Jus-Rol. However, there is nonetheless, clear evidence that Cérélia monitors the sales and retail prices of Jus-Rol products."

And you see specifically for what purposes in the confidential text there and rejecting what Cérélia had said about that and that it regards Jus-Rol as a competitor in 9.92:

"In addition, GMI's internal documents show that it monitors and benchmarks Jus-Rol against PL. As described above, while references to PL that we've seen are typically generic, do not name the wholesale suppliers or retailers, we believe that they suggest a universal constraint posed by the underlying provider of that PL product, who determines many of the key competitive parameters, such as wholesale price and quality and by Cérélia in particular, as by far the largest PL supplier in the UK market, with a value share more than two times as large as the next largest."

GMI internal documents do not -- you see the rest of that sentence, in respect of who is identified there.

The question this morning to Mr Kennelly about benchmarking when he said: look, in these internal documents, the prices being monitored are retail prices, to which the obvious response is: well that's all that they can monitor. They cannot monitor wholesale prices. But, of course, we bear in mind those retail prices are not being set by the parties, they are being set by the retailers. So the parties are monitoring these because it's relevant to their wholesale prices which they are going to offer.

So the question is why are they monitoring those retail prices, if not to inform their wholesale pricing? And Mr Kennelly offered no explanation of that at all. The CMA reached its conclusion on that which I will, in due course, submit was wholly rational and open to it.

All this is why you cannot treat evidence of wholesale competition and evidence of

retail competition entirely independently of each other. I said I would go to 7.102 a moment ago. That is on page 160, under the heading "The implications of --"

MR RIDYARD: I am sorry, could you give me that again.

MR PALMER: Yes, it's page 160. 7.102. The implications of the connection between PL and branded product competition at the retail level and competition at the wholesale level. You can see what is said there. I am just going to ask you to read it.

(Pause)

Particularly that last sentence because as you will recall, one of the refrains that we heard from Mr Kennelly as he went through the underlying evidence, making comments, I will submit, on the merits of what they show, one of the refrains was: well they are discussing retail here. If it could be ignored and didn't inform the competitive dynamic with which the CMA had said -- identified as was concerning it in its theory of harm and that isn't the position and isn't the approach the CMA took.

Now, of course, the volumes bought at wholesale level may be very strongly influenced by customer preference and, indeed, anticipated customer choices to be made in respect of the offer. But, of course, it's wrong to think of customer preferences, as Mr Kennelly repeatedly urged you to do so, as being fixed, displaying high degrees of brand loyalty, with little attention to what's happening at the margin. There may be a certain degree of brand loyalty, of course, but these things are affected by dynamic competition too and they can be expected to be affected over time by the playing out of that competition too.

So the retail price of the product, including, as we've seen, the differential between the PL product and the branded product, whether that difference is justified in terms of perceived quality, the quality of the product itself which will obviously affect customers' willingness to come back and buy it again, the perception of brand value, innovation, new products new things to try and because retailers set the retail price, they can

influence the level of demand from their end customer by changing the price. So raising or lowering the retail margin, in effect, or via other non-price measures which don't form part of the negotiation with wholesalers, such as positioning on the shelf, whether you are at eye level or down on the floor.

So assessing how end customers react may well be relevant to a retailer's incentive to flex its product mix but it doesn't affect its ability to change its ordered volumes. It clearly has that ability to change its ordered volumes.

All of this is what generates the competitive tension identified by the retailers because each supplier, as I said, is incentivised to make their offerings as attractive as possible, in an effort to win as great a proportion of the available shelf space as they can and sustain their position or improve their position over time, notwithstanding whatever other offerings may be being made through the other channel.

The retailer will always choose the best deal for it. Even when they want to offer the customers the choice, they will flex volumes to respond to what customers want and to their own commercial interests.

That is what the retailers described and it's described in core bundle pages 200 to 201.

I take you now to these two paragraphs in particular because these paragraphs which Mr Kennelly said right at the outset of his submissions were irrational -- he identified 9.67 and 9.70. To set them in context, here is at 9.65, the CMA's assessment of third party views on competition between the parties. So we are dealing with closeness of competition here and we are dealing with summary assessment at the end, of the views expressed first by retailers and secondly by competitors.

The assessment, 9.65, carefully considers significant volume of evidence from third parties:

"We note the mixed response from suppliers but consider this is, to some extent, likely to reflect the channel specific nature of the tendering process."

Then on to retailers:

"The majority of retailers responded to us ...(Reading to the words)... an implicit but important constraint between the parties which will be lost as a result of the merger."

We'll see in due course how the CMA analysed that loss. It wasn't just simply a question of taking what the retailers said and saying, you know, it's important evidence but that wasn't the end point but that was said to be irrational and, actually, when you read what they say in context and what the CMA actually made of that evidence in terms of identifying the SLC and the source of it, there's nothing irrational and, indeed, there was a consistent and coherent view from retailers along the lines I have outlined.

Then there's reference to tendering evidence and this is a narrow part of the market, of course. The evidence and assessment is wrapped up in one on that and at 9.70, the finding that:

"The retailers' decisions about how much product to purchase across the two channels is not agreed as part of the tender process but is determined through ongoing discrete orders, where retailers can flex their demand between retail and branded options and it's through this competition for shelf space, as described by the grocery retailers above, that the constraint between the parties occurs."

We submit there's nothing irrational about that either.

The last paragraph, I think, that was identified by Mr Kennelly as encapsulating this view of the analysis of the SLC was at 9.152 which is on page 239. This, as you can see from page 238, appears in the conclusion of the part of the competitive assessment which dealt with closeness of competition. The conclusion beginning at 9.150. Mr Kennelly took you to 9.152:

"The evidence from third parties indicates that the parties are close competitors. While some DTB suppliers were focused on within channel competition, third parties

generally considered Cérélia and Jus-Rol to be competitors. The largest retailer customers who make up a large majority of the overall market articulated a consistent and coherent view that there is an implicit but important constraint between the parties which will be lost as a result of the merger. In particular, they explain that they value the ability to weigh up the parties' offerings across the PL and branded channels in order to get a better deal and negotiations, particularly in terms of price and quality."

So, again, that is weighing up what is being offered, deciding which deal to go with: Of course, interaction with each supplier in the negotiations, saying: well can you do a better price? Can you commit to a certain degree of promotion expenditure? Can you commit to this or that? Or whatever it may be. But at the end of the day, they are weighing up what's going to make them the most money and serve their customers best and fulfil their commercial considerations. That does not, implicitly or explicitly, involve independently -- regardless of their commercial interests, regardless of how it will hit them in the pocket, if they end up with no product, they threaten in the way Mr Kennelly said the CMA was concerned about.

If you go to page 195. I am conscious I am dotting around at the moment. I will be going through it more methodically. The reason I am doing so at the moment is having heard Mr Kennelly yesterday, I just wanted to nail this fundamental misapprehension.

THE CHAIR: What page are you on now?

MR PALMER: Page 195. Part of the summary of grocery retailer views on competition between the parties. You see on 195B, a long paragraph dealing specifically with the views of one large retailer, who is there identified. All of that is important evidence which I invite you to read in due course. But can I direct your attention for present purposes to the last ten or 12 lines, where it says -- it explained it:

"... will not give granular details about one supplier's offer to the other in the context of

negotiations but both suppliers know that it has a relationship with the other, such that there ought to be at least implicit knowledge that given the finite shelf space, if one supplier is performing better, it is more likely to be granted more space on the shelves. It told us that this is an important dynamic for getting a good deal for its customers, as it is what drives the supplier to continuously improve by offering better products, service and/or better cost prices. Additionally, it's submitted that the competitive tension also plays out, where it doesn't stock equivalent versions of the parties DTB products. It said that this tension plays out in its overall relationship, such as the innovation pipeline. That's because there's an incentive for suppliers to keep performing well, as this maintains a good relationship, improves their chances of continued business and being chosen as the supplier to launch a new product with. So that innovation is one of the main ways the competitor tension between the parties plays out because innovation is arguably the main differentiator between what are otherwise homogenous and substitutable products."

So there is the competitive tension, it's the innovation, it's the offer. It's not about random explicit or implicit threats at opportunistic moments, trying to put duress on one supplier or the other to do better, on the basis simply of a naked threat that would otherwise go to the other. That's not the dynamic which is being described and it's, in my submission, entirely unsurprising that when we went through the extensive tour of the evidence, you didn't find evidence suggesting that was the basis upon which it was operating because that's not the basis which the CMA described. It's not the basis of the SLC that it found.

Now, of course, the CMA was particularly concerned against this background by evidence that post-merger, those incentives which are here described, as elsewhere, would change, as a single supplier achieved very substantial market power in both channels, giving rise to the risk that they could degrade the product in either or both

channels, without facing a real threat of losing out overall.

That's the key point to make clear right from the outset.

Now we made this point, as I have spent my time so far outlining to you, in our defence. I will give you the reference. It's at paragraph 48 which is -- I won't turn it up now but for your note, it's core bundle page 58.43. Cérélia responded in its amended Notice of Application at paragraph 57 -- for your note, you need not turn it up, it's core bundle page 16 -- to say that although the CMA identifies various dimensions across which suppliers may try to compete with each other on price, quality and innovation, it says that the CMA does not suggest any alternative negotiating lever held by the retailers, except control over shelf space, ie what they then describe as the threat that they will choose to stock different products.

But that still fails to engage with the CMA's point. Again, as I have said, firstly, the competitive tension does not only play out within the four corners of a specific negotiation, where the implicit threat of losing out on shelf space is operative. That's the implicit risk of losing out on shelf space if you are not attractive enough. The point is that the competitive tension is constituted by an ongoing process of rivalry and it's that which gives rise to incentives to suppliers, not just the negotiation, to compete for orders on price, quality, innovation to the benefit of the consumer, the incentive to give the supermarkets their best deal.

It's those incentives which the CMA expects to be changed by the merger.

Again, I will show you that in due course. But the tension in Mr Kennelly's position came out in very early exchanges with the tribunal and with Mr Ridyard, in particular, yesterday morning, where faced with what I would respectfully describe as a conventional analysis of how the competitive tension might work in terms of the relationship between retail and wholesale, Mr Kennelly doubled down on his position again and again, claiming that the CMA's SLC did not involve such matters as retailers

making any assessment of anticipated volumes, negotiating for a better deal, on the basis volume would be lost if prices were raised, resulting in a flex to the other channel. He said "That is not the constraint identified". Day 1, transcript, pages 21, lines 8 to 14 and read on through to page 26, in which there was quite an exchange. The chairman as well, putting these points to Mr Kennelly, all of which leading him repeatedly to say, culminating on page 26, that the CMA performed a different analysis to that which was being put to him which is much more crude and which is limited to the idea that retailers can obtain better terms simply by threatening to switch, without more.

My submission to you is that is simply incorrect. But that is the launch pad from which we went on an exercise which reminded me of trying to hunt the snark. It may be that not everyone is a Lewis Carroll aficionado, but the snark which Mr Kennelly was purporting to search for and find missing, was evidence that a retailer had mentioned threatening a supplier with switching, in order to obtain better terms, without reference, at the same time, to anything involving consumer demand, retail competition, retailer's own commercial considerations and strategy but which amounted, in effect -- he didn't put it in these terms -- but simply a flexing of muscle.

Now that snark is an imaginary creature and if I remember the original correctly, in the original the snark only actually appears in the dreams of a barrister and that, we say, is the position here. I want now to take some time to go through the report in a way that Mr Kennelly did not, to show you the structure, the competitive framework and how that was squarely built on the merger assessment guidelines, the MAGs, as they are known. Indeed, analyse how that was analysed as a merger which gave rise to horizontal unilateral effects.

Before I do that, I want to remind ourselves and also respond to a question raised by the chairman earlier, as to what the rules of the game are. What does the law say on

irrationality, what are we looking for here? What exercise is the tribunal engaged in? You will recall that yesterday morning there was some criticism from Mr Kennelly about our approach to the law in our skeleton argument but you will find our approach in the hearing bundle 1, at page 26.

At paragraph 12, where he states:

"It ought to be common ground that the key legal question arising on ground 1A is [it's citing Tobii] whether there is evidence available to the CMA of some probative value, on the basis of which the CMA could rationally reach the conclusions that it did."

So we adopt that test. There is some criticism of the way we've responded to some of their submissions.

Mr Kennelly happily accepted in his submissions to you yesterday, that that is a high hurdle. He said: we do not shrink from that but in writing, there was a bit of shrinking from that, taking objection to the high hurdle and it's that to which we were responding.

THE CHAIR: But we all agree the Tobii test is --

MR PALMER: Tobii is the test. You asked the question, sir, in that connection, if that's the formulation, what do we mean in this context by probative, evidence of some probative value? The answer to that question is provided by one of the authorities in which Tobii and, indeed, many other CAT authorities have referred to which is this Stagecoach decision which you'll find in authorities bundle 1, tab 19.

Authorities bundle-tab 19, page 801. Mr Kennelly took you to some of this as well. This is where you find the point at paragraph 42. I will ask you to read that. I think we are all clear it's not the tribunal's task to reassess the relative weight of different factors arising, the task is to assess whether the Commission had an adequate evidential foundation for arriving at the factual conclusions it did, in the sense that on the basis of the evidence before it, it could reasonably have come to those conclusions. At 43, there's a further explanation of that by reference to Wade & Forsyth and in the indent:

"It's one thing to weigh conflicting evidence which might justify a conclusion either way or to evaluate evidence wrongly, it's another thing altogether to make insupportable findings. No evidence does not mean only a total dearth of evidence, it extends to any case where the evidence taken as a whole [I stress] is not reasonably capable of supporting the finding or where, in other words, no tribunal could reasonably reach that conclusion on the evidence."

Some connection with the ultra vires principle.

Then at 45, we accept the Commissioner's analysis of the law, it's a high hurdle and it's a high one where Stagecoach asserted there's no or no sufficient evidence to support one of the Commission's key findings:

"Stagecoach will show either there's simply no evidence at all to support the Commissioner's conclusions or on the basis of the evidence, the Commission could not reasonably have come to the conclusions that it did. In fact, alternative conclusions might have been available is not determinative and so you must be aware of a challenge which is, in reality --"

THE CHAIR: What paragraph are you on now?

MR PALMER: 45.

THE CHAIR: Yes, I have read that.

MR PALMER: "... be aware of a challenge which, in reality, is a challenge to the merits under the guise of a judicial review."

Probative in this context means no more than that: is it evidence upon which a tribunal or here, the CMA, could reasonably reach the conclusion? That's the evidence taken as a whole. It's not enough to go piecemeal through each individual piece of evidence and say: that individual piece of evidence could not rationally support a finding, on the basis of that piece of evidence alone. You have to look at how all the evidence relates to all the other evidence and what it all adds up to in total.

Again, in terms of marrying this up with the test of probative evidence, in that connection, if you are looking at a particular finding, you are looking at all the evidence which is relevant to or found to be relevant to that finding. Then the question for the tribunal is, is that a reasonable conclusion on that evidence or has that conclusion simply been bolted on and bearing no relationship to the evidence which actually is said to underlie it? A mismatch, a jump in logic, something that's missing between the evidence and the conclusion. That's when you can find there's no evidence of probative value supporting this, there's nothing that supplies a missing link. But that's how it has been described, for example, in Law Society and many other more general authorities.

So that is the exercise. The reference to probative value is not an invitation to the tribunal to assess for itself what probative value it has, in the sense of what it would make on the merits of that evidence, what it would decide. So the question is, could any reasonable decision maker arrive at the conclusions it did on the basis of all the evidence which is relevant to that conclusion taken as a whole. That is the exercise with which we are engaged.

That leads me next to the last introductory piece before we look at the decision in more detail.

THE CHAIR: Can I put this volume away for now?

MR PALMER: Yes, indeed. Thank you. Which is to relate all of this to the history of how the parties have analysed this merger on their theory which goes to Mr Ridyard's 2 o'clock question. You will know that the CMA found that merger parties were horizontal competitors in the market which it found on its market definition which is unchallenged and which I will go to, for the wholesale supply of DTB products to grocery retailers in the UK. That was so, notwithstanding they competed through different channels and whilst acknowledging and taking into account the fact that there

was also a vertical link between the parties, inasmuch as Cérélia also provided contract manufacturing services for Jus-Rol, that was fully taken into account in that analysis. But the CMA rejected the merger parties' various claims that they were not competitors at all but operated in entirely different levels of the product chain. It rejected the claim that Cérélia was simply a contract manufacturer, competing against other contract manufacturers and Jus-Rol was simply a consumer brand, competing with other brands and it rejected Cérélia's assertion that the merger should be analysed through the lens of a vertical merger, by reference to a theory of harm, if one was to be advanced at all, based on input foreclosure.

In its decision, the CMA gave full reasons for taking those positions and I will show you them. They were certainly not irrational. But having found horizontal competitors in the market, as defined, it then conducted a wholly orthodox competitive assessment in accordance with the MAGs and I will show you that too. But the introduction to Cérélia's skeleton argument, like the introduction to Cérélia's Notice of Application, flatly ignores those findings, findings that both parties are suppliers of DTB products, who compete on a horizontal basis and asserts that they are vertically related only and, indeed, my learned friend's skeleton argument -- need not turn it up -- paragraph 15, then asserts that the SLC that the CMA identifies is a novel one. It says:

"Applying a horizontal unilateral effects theory of harm to a merger of two vertically related parties."

At 16, paragraph 16, skeleton argument, he asserts that:

"It was therefore imperative to establish a coherent framework for the CMA's analysis by reference to Meta, setting out in the abstract but with reasonable certainty, the relevant factors that needed to be considered."

It's that background of their contention they were vertically related only and not

horizontal competitors in any market, that gave birth to Cérélia's submissions that during the merger process, what the CMA must, in fact, have been relying on is the making of a threat to extort better conditions. Because on Cérélia's view of the world, at least at that stage, there was no other basis upon which a competitive tension could arise because on their view of the world, they were not horizontal competitors in this alleged market, whose definition they did not accept at all.

Now it doesn't appear -- I've got in my note here that the theory of a vertical only relationship is pursued. We heard of that from Mr Kennelly but after 2 o'clock, we heard that it was. But there are, in fact, no grounds or arguments tackling the CMA's conclusions that they are horizontally competing rivals. There's nothing which goes to that in the pleaded grounds of application. There's this assertion at various points which sort of surfaces at some random points during Mr Kennelly's submissions to the effect: oh, of course, we are not competing directly. That's not what the CMA found and there's no grounds challenging that.

Again, what we have in this alleged theory of harm, turning on the making or otherwise of threats, is in effect, a hang over from that analysis.

THE CHAIR: You are saying they are not competing directly when it comes to tendering on the PL side and --

MR PALMER: Except the tender process is used at all.

THE CHAIR: Exactly, and that's clear, but you are saying they are competing --

MR PALMER: On the wholesale level.

THE CHAIR: -- on the wholesale level between each other, obviously.

MR PALMER: (Inaudible due to overspeaking).

THE CHAIR: Yes.

MR PALMER: A lot of the reasons and documents which my learned friend took you to all the way through, it's important to bear in mind that throughout the investigation

process and, therefore, CMA needed to deal with this in the decision, the parties' position was they were not competing with each other, they were not closely related products, they were not close competitors. All of that was in issue.

So the CMA had to gather evidence and produce evidence and provide reasons as to why they were, in fact, closely competing, why they were competing on a horizontal level, why the market as defined was one where the supply of dough-to-bake products at a wholesale level to UK retailers, and not this vertical relationship only, which has been asserted again but not developed by my learned friend. So often the documents -- he says: this doesn't support the theory of harm. Well not taken on its own and certainly not the theory of harm that Mr Kennelly said that we were trying to -- but all of this is relevant to the fact there is that basic horizontal competitive relationship he identified defined market selling on and what the CMA was concerned about was the change of the existing incentives which would be consequent on the merger.

MR RIDYARD: I was just going to observe there is a potential for confusion here, I think. There are two strands to this argument that the parties don't compete. One would be an argument that private label products and branded products don't compete with one another because they go through different channels from one another. The other is accepting there is competition at the retail level, certainly between private label and branded products. When you look at an SLC concern in this particular merger, you need to take into account the peculiar fact that one of the parties is already manufacturing for the other.

MR PALMER: And that we did, yes.

MR RIDYARD: And you do -- yes, you are saying you do take into account that latter factor?

MR PALMER: Yes, it's analysed on the basis of a horizontal unilateral effect theory

of harm but taking particular account at various points which again, I will show you, of that vertical relationship. So it's not completely vanilla, in that sense, you have a raspberry ripple but it's still analysed on a horizontal basis and not on a vertical basis and it's analysed on the basis there is that implicit competitive tension between the parties because they are both interested in getting as great a share of finite shelf space as they can, based on their offerings to their customers, who are the retailer supermarket grocers.

That, we say, is well established in the decision. Even if an alternative assessment or view of the world were possible, it is impossible to condemn that framework as being irrational and, indeed, I don't detect any claim of irrationality in my learned friend's grounds about that.

THE CHAIR: We didn't hear anything about it.

MR RIDYARD: To be clear, the framework could be the right framework and agreed but it's possible one could argue that because of this factual peculiarity, it might affect the rationality of an SLC finding.

MR PALMER: Yes.

MR RIDYARD: If you found that incentives were different here than they are as if Jus-Rol made its own (Overspeaking).

MR PALMER: You clearly have to take that factor into account. You clearly have to take into account evidence which is relevant to that and how that might affect the way in which competition operates. It's clearly going to -- in fact, we saw it in one of the documents you were shown this morning, where there was an analysis by Cérélia of the effect of a loss of a particular contract and they said it's obviously two Jus-Rol, so they're still getting a source of income from the contracts which Jus-Rol have won, by virtue of that relationship but, obviously, they are making less money than they would have. That's what's identified in that document.

So that clearly affects their incentives, attenuates it to a certain degree but not completely.

MR RIDYARD: Okay.

MR PALMER: I am about to embark on the Decision and it may be an appropriate point for the mid-afternoon break unless the tribunal indicates otherwise.

MR CUTTING: Can I just ask a question first because I think you said that it was the parties' arguments that they were in a vertical relationship, gave rise to the requirement, on their argument, for the CMA to demonstrate a threat. I am being very slow but what is the nexus there? What is the chain of reasoning?

MR PALMER: Well, I will do my best to describe it. It's not my chain of reasoning, it's that which was put forward by Cérélia. But, of course, if you are in a world where you are not in a horizontal competitive relationship, where Jus-Rol and PL are not directly competing with each other and that's your primary submission, you still have to explain why it is that some retailers obviously form the view that there was a competitive tension, where does that arise from? And what Cérélia and Jus-Rol alighted on in their submissions was the idea that what would be necessary is an implicit threat or, indeed, an explicit threat to say -- to use leverage in the sense of saying: improve your terms or I will cut off my nose to spite my face and go with the other party, regardless of whether that's actually a better commercial deal for me.

Because if you are immune to any other competitive -- ordinary competitive discipline or constraint, you've got to come up with something, I guess. But that, I stress, is not our analysis. We say they are constrained by the need to sell as much volume as they can.

MR CUTTING: That's your characterisation.

MR PALMER: That's our characterisation which is why, when you go through all those documents, when you have plenty of consistent and coherent evidence, precisely I will

say, describing that dynamic and playing off the parties in that context of saying: well is this your best offer? You don't need to say: because I do have an alternative, you know. That's obvious to anyone within the industry that they are competing for limited shelf space, often with big retailers, retailers who want to carry both lines. But the question is, to what extent do they flex? The question is, to what extent are they going to maintain their existing volumes, increase or decrease them, which will be constantly revisited over time, depending on market developments. So you can play off competitors in that sense because you are always encouraging them then, to give you their best deal on the commercials. But where we part company on this analysis is we say because then retailers will respond to the best deal, taking into account consumer demand and preferences, taking into account their own commercial and strategic considerations, et cetera. They won't and we've never suggested, that they will sort of have this sort of independent threat, divorced from all of those considerations, and just try to extort a better deal by sort of exercising a corporate muscle.

MR CUTTING: Okay.

MR PALMER: But that's the story that you were told yesterday. We reject it as mischaracterising our finding in the SLC.

I am just noting the time.

THE CHAIR: No, that's fine. We will rise.

(3.23 pm)

(A short break)

(3.32 pm)

THE CHAIR: Yes, Mr Palmer.

MR PALMER: Yes, sir, and members of the tribunal. Thank you. I want to take you now to the decision itself. I am conscious, of course, that the tribunal will have had an opportunity to read the decision and, of course, will no doubt go back to it, so

I don't intend to spend time reading it all out to you. But I would like just to show you as swiftly and efficiently as I can --

THE CHAIR: Yes.

MR PALMER: -- the structure in which it reaches its conclusions, with a particular focus on how it relates the nature of its analysis to the merger assessment guidelines, what that framework for the analysis of this merger is, including taking into account the vertical relationship as necessary.

So I am going to give you a lot of references. I have been asked by the transcriber to speak a bit more slowly, so I am going to try and go a bit faster through the decision, while speaking more slowly, and giving you the references, in the hope that that comes to be useful at a later stage.

Can I start on page 108 of the core bundle in the decision.

THE CHAIR: It might be helpful, at the end of the day, to have on a piece of paper all the paragraph numbers that either of you want us to read when we go back to considering this and reaching our decision. Look, there's quite a lot there, I have read it twice now and I don't want to read it a third time.

MR PALMER: If you have read it twice, that's more than good enough. I invite you to --

THE CHAIR: I am serious (Overspeaking).

MR PALMER: (Overspeaking), apart from chapter 10 to which there is no challenge entry to --

THE CHAIR: No, but there will be specific paragraphs you are saying: look, when you go over it again for the purpose of reaching a decision, that both of you think I should be looking at carefully.

MR PALMER: Yes.

THE CHAIR: Because, honestly, I am not going to read it again.

MR PALMER: No.

THE CHAIR: I will read whatever paragraphs that both of you think or either of you think I should read again. So if I can have that --

MR PALMER: We can do that.

THE CHAIR: -- by close of business tomorrow, ie before you leave tomorrow. But you've got juniors on both sides.

MR PALMER: Yes, they have some other tasks to do tonight as well but we will certainly endeavour.

Can I start in chapter 6 which you'll recall is the approach to competitive assessment. It starts at page 108 and go straight to 109, just to point out as a matter of broad generality at this stage, right from the outset of the competitive assessment, from the very beginning, define the approach at 6.5, 6.6. It's highlighting the interplay between branded and PL and the implications of how consumer behaviour may drive or influence. Then at 6.6:

"Throughout the assessment, we've carefully considered the activities performed and particularly in circumstances where there is ... "

In the final sentence there:

"... the pre-existing vertical relationship which is relevant to the assessment of the competitive dynamics."

At 6.10, over the page, just expanding on that further, you can see close attention to the roles at different stages and segments of the overall supply chain, recognising the input and the product. Also the product often sits alongside the PL product in the aisles. But in our assessment of market definition, we focussed on the wholesale supply by the parties of DTB to grocery retailers and that is explained, so we'll get to that in the market definition.

Again at 6.11, recognising that the parties have submitted the merger is purely vertical

and the CMA erred by analysing through a horizontal lens is, in fact, they say, an essentially vertical foreclosure theory of harm and that's to be addressed as well. We consider the horizontal framework is appropriate.

Then on to 6.15 to 18. You see here a section headed "Theory of harm". Explaining, again, it's the horizontal unilateral effects in that market which is defined in the subsequent chapter, "Market definition", chapter 8. It's an explanation now by reference to the MAGs. You can see from 6.16, you can see references to 4.1, bottom footnote on that page and over the page, 4.3 and 4.8 of the MAGs. I am not going to take time turning it up. For your note, the MAGs appear in authorities bundle 5 at tab 56. What these paragraphs largely do is reproduce their content, so that's why I am not going to turn them up separately, you can look back at the footnotes, if it's of interest.

6.16 is the CMA directing itself by reference to a classic horizontal unilateral effects theory of harm, that described, and 6.17, it relates to:

"The elimination of a competitive constraint by removing an alternative to which customers could switch."

So that's Cérélia versus Jus-Rol:

"The CMA's main consideration is whether there are sufficient remaining good alternatives to constrain the merged entity post-merger and where there are few existing suppliers [I interpose as here], the merger firms enjoy a strong position [I interpose as here], or exert a strong constraint on each other [I interpose as here], or the remaining constraints on the merger firms are weak [I interpose as here], competition concerns are likely.

"Furthermore, in markets with a limited likelihood of entry or expansion [I interpose as here], any given lessening of competition will give rise to greater competition concerns."

So that is the self direction given to the basic theory of harm and then at 6.18, setting out that stage of the nature of competition, then the closeness of competition, then the strength of any alternative competitive constraints and then the nature of any harm arising from the merger. That's all part of theory of harm and considering product differentiation and the contractual vertical link.

Then at 6.21 through to 6.25, you see differentiated nature of the markets being considered and, in particular, recognition that there could be an asymmetry. You see that at 6.24, 6.25. That doesn't preclude a finding of an SLC. The SLC may arise from the loss of a one side constraint and some examples of that are given.

Again, the CMA directing itself by reference to MAGs, paragraphs 4.10 and 4.11, at paragraph 6.22 and 6.24 respectively. Again, closely tied to the framework provided by the MAGs.

Then at 6.26, over the page, consideration of vertical relationships within the supply chain. Again, expressly considered there, through to 6.27.

So I need not dwell on the rest of section 6. The tribunal has read it. But that's just to set up in terms of outlining the framework and then we go on in section 7 which begins at 135, to detail features of the sector.

At 7.8, I have already shown you that section, 7.7 through to 7.10, about grocery retailers' purchasing decisions. I need not go through that again. I have done all the way through to 7.13 already. Similarly, the PL supply process I have already covered, from 7.20 through to 7.23, followed by the tender process.

Then at 7.28, the branded supplier process and cross-channel competition identified. All of that I have already shown you and I need not dwell on it again.

The next main heading to be aware of is at 7.80 which is the consideration of switching, page 155. Noting that switching within the branded channel is extremely rare, not being aware of any examples in the last 5 years. So we are focusing here on switching

suppliers between suppliers within the PL channel and the conclusion at 7.81 is that does occur but does not happen frequently, with five instances of switching in six years.

At 7.83, when it does occur, it may only relate to certain products or stock-keeping units. There's an example given of that. 7.86 to 89, that's according to most retailers, switching is difficult or very difficult. That's within the PL channel, although two did say it was easy.

So that is the extent of switching within channels. But 7.90, switching between existing suppliers, so rather than either of those two courses which may be difficult, retailers may choose to switch volumes between existing suppliers. The analysis there from 7.90 to 7.92, it's this which is said to be relatively easy and costless.

What is being referred to here at 7.90 is not switching for the hell of it or switching on the sort of process which Mr Kennelly suggested, but just the ordinary switching constantly to get the best deal which, of course, is easy and, of course, it's costless because, by definition, retailers are looking for the best deal, they are looking for the best offer they can get. The attack on this conclusion that it's easy and costless came from Mr Kennelly's suggestion that somehow the constraint identified by the CMA, depending on switching, even when it's not in the retailers' own commercial interest to do so, but a separate exercise of muscle. You don't find that in this decision.

So that form of switching is easy and costless and there's more explanation of that and I won't repeat 7.91 and 7.92, I just draw your attention to that.

Then market definition on page 160. Here, you get express consideration under 8.2 of the parties' submissions that the production of DTB products involves two distinct vertically related economic activities, upstream manufacturing, downstream brand ownership and it's said that the CMA was committing a conflation error, conflating these two levels of supply chain into a single homogenous activity and that is then

analysed from 8.4, all the way through to 8.24, which I don't intend to take huge time over.

But can I point out that 8.13, page 164, through to 8.19, there is specific analysis of demand side substitution between PL and branded products at the wholesale level. That, of course, is -- have I got the right reference there? Sorry. Yes, and then supply side substitution being considered at 8.20 to 8.22. There is perhaps a heading missing under 8.22 because the heading, perhaps, should be "Conclusion" or "Assessment", because at 8.23:

"In light of the demand side and supply side factors set out above, we consider that the market definition should include both DTB products supplied to grocery retailers in the PL channel and branded DTB products supplied at the wholesale level."

Then an acknowledgment at 8.24 of the link between retail and wholesale demand, and an explanation of that. Concluding at 8.24, at the end there, that:

"End consumer demand is therefore relevant commercially to Jus-Rol, insofar as it influences the volumes sold at the wholesale level. We consider that the evidence in this case should be viewed in this practical commercial context."

So that is the account you see of the wholesale market which is defined and to which I detect at this stage, at least in the grounds of application, no ground of challenge submitting that that or what follows in the ultimate conclusion at 8.70, page 178, is irrational.

So that is the basis for the competitive assessments which then begins at page 178. You see a very structured approach undertaken. You see the structure spelt out at 9.2, (a) through to (g). I will be the first to say -- and I don't know how the tribunal finds reading these lengthy decisions -- that those signposts don't always appear as clearly as they might as you turn here, for example maintaining that (a) through to (g) as you go through. But that is the structure and you can map the various parts of this

competitive assessment on to those subheadings. So you can see (a), we set out our estimates of the shares of supply and then we are straight into that shares of supply as the starting point.

It's the starting point because, again, under the MAGs which are relevantly reproduced at 9.4 and 9.5, we are told that:

"One way in which the CMA may assess whether there's sufficient remaining alternatives is through a consideration of measures of market concentration, such as shares of supply. And whilst the focus is on the change in competitive constraints because of the merger, where one merger firm has a strong position in the market, even small increments may give rise to competition concerns and then consideration of the position in differentiated markets, where horizontal unilateral effects are more likely, where the merger firms are close competitors or where their products are close substitutes."

That's why the next heading, going back to the top of the page, (b), is whether the parties are close competitors. Following the guidance set out in the MAGs, that's the natural next step to look at, to the extent that these products are differentiated, at least at wholesale level.

Then looking at the shares of supply, again the tribunal will have seen that, through 9.4 through to 9.6, directing itself in accordance with all those MAGs which are footnoted. I won't read all that out, I ask you to review very carefully though, the references to the MAGs. You will see that guidance mapped across the analysis.

Then at table 9.1, obviously you see Jus-Rol and Cérélia, right at the top, with considerably larger shares than anybody else and these are shares of the wholesale supply estimates for DTB products by value to grocery retailers in the UK. This is what we referred to in our skeleton argument. You may recall we got some criticism for referring to this in our skeleton argument from Mr Kennelly yesterday, shown without

regard to the differences between them. But once you've defined the market as embracing suppliers of wholesale DTB products to grocery retailers, it's quite right to put them together, always remembering they compete through different channels and analysing that through. But you can see just by adding up those two totals, where they will end up, what bracket they will end up in, following the merger and you can compare that to the others that appear in that table, in terms of that market power. So the conclusion at 9.9, a very high combined share in the wholesale supply sustained over time and sustained at least up to forecast and further forecasts given there.

THE CHAIR: On that table 9.1, we have "Other branded", and a percentage there.

MR PALMER: Yes.

THE CHAIR: How much of the ones above, apart from Jus-Rol, is branded?

MR PALMER: Only, only Jus-Rol.

THE CHAIR: That's the only one.

MR PALMER: Sorry, that's not true. Sorry, let me just check. No, I think because Bells -- let me just check on that for you. Can I give you the answer a bit later.

THE CHAIR: Yes, when you look at it from the two different sides, which if you look at it from Cérélia's point of view, on one view a major competitive constraint is other PL suppliers --

MR PALMER: Yes.

THE CHAIR: -- because that's what they are going to lose. But that's there with or without the merger.

What is additional that you lose with the merger is the competitive constraint of not going to another PL supplier but actually getting more product from Jus-Rol.

MR PALMER: Yes.

THE CHAIR: When you look at it from the other point of view, when you are looking at Jus-Rol's point of view, the other competitive constraint isn't, in any real big sense,

other branded products coming in --

MR PALMER: No.

THE CHAIR: -- because they dominate the market pretty well. But the other competitive constraint is the PL side and that one you do lose to a large extent in the merger.

MR PALMER: Yes. You do. You lose a massive constraint on them. And that's why we get into the arguments about what capacity is left in the PL sector and, of course, I will come on to that.

THE CHAIR: There's a lot in the report on that.

MR PALMER: Bells, I can see just -- you can see the asterisk, you can see that -- or the cross there, the other branded includes brands like Bells, Dorset Pastry, Picard, Pret A Manger --

THE CHAIR: It's in there, is it?

MR PALMER: You can see there are some brands but we understand Bells' branded products had approximately and then there is a figure which is in the nought to 5 per cent range but you see what it is, of wholesale supply, in 2021. There may be more we can tell you but that's what I see on the face of that but it's small. It's small. These two operators dominate their respective channels.

THE CHAIR: Yes.

MR PALMER: And you can see at 9.14, the conclusion on that.

So that is the consideration of shares of supply but then because of the differentiated nature of the products at wholesale level, ie the different services being provided with the supply, the different channels in other words, they are undifferentiated, effectively, at retail level. That's conceded by the parties. But at wholesale level, you are looking for indications of closeness of competition.

You can see again that the CMA, very carefully, directing itself in accordance with its

MAGs at 9.15 and 9.16. You can see the footnotes to paragraphs 4.8 and 4.10 of the MAGs, with text there, from 9.15 and 9.16 being reproduced from it. So they direct themselves very carefully in accordance with established guidance and then in this section, that's the section on closeness of competition, 9.18, they consider the evidence on competition between their parties in their supply to retailers at the wholesale level. Evidence of competition between PL and branded products at the retail level and then the vertical relationship between the parties, being again, expressly drawn out and separately considered in this context, to see how that feeds into the analysis.

And I am just going to ask you to hold a finger in that page, if you are using the hard copy version, and just turn forward to the conclusions of the closeness of competition section, just to locate where this analysis ends. This analysis finishes at core 238.

This whole section, that span of 60-odd pages, is all about assessing that closeness of competition, so the conclusions on that sub-issue, from 9.150, running through to 9.156 -- I shan't read it out but the tribunal have seen it all before and I went to 9.152 earlier but that's summarising and it's only summarising what's gone before. It's not a substitute for actually looking at the detail of what's gone before. So expressed in general terms, obviously those conclusions, and need to be read in the context of what's gone before which is substantial.

So going back to reality to keep a finger where I asked you to keep a finger, at 9.22, perhaps 9.21. So you can see the first of the three sections which is going to do -- is the competition between the parties in their supply to retailers at the wholesale level and that is then split down into two subsections which is the nature of the parties' offerings, dealt with quite briefly and then the evidence on competition between the parties.

Then the nature of the parties' offerings is dealt with at 9.22 and that's then split down,

firstly, into assessing the activities performed by the parties, followed by consideration of the physical product provided by the parties. So recognising the difference in activities through the two different channels and that activities are then assessed from 9.23. Again, you see the parties' submissions on that.

They say, 9.24A:

"We are not supplying the same products because Cérélia is a manufacturer, GMI is a brand owner ..."

Et cetera. I shan't go into it, but again, consideration of the evidence of that from 9.25 through to 9.34, showing, as is said at 9.25, they provide a similar overall service to retailers. They both supply DTB products to retailers for inward sale to end customers, noting the contractual basis upon which they supply their products to retail, separately from those activities, as the parties self define, looking at the actual services they provide and concluding at 9.31, both parties are undertaking the same activity of supplying DTB products to retailers for onward sale. There are differences in the services they offer, flowing predominantly for different channels, so explanation of that. 9.34, considering that whilst there are differences in the services they offer, they engage in substantively similar activities and compete to supply the same customers. So that's where they focus in on the actual nature of the economic activities they are dealing with rather than their self characterisation of brand or manufacturers.

MR RIDYARD: Sorry to interrupt but I think you are sort of at cross-purposes with one another a bit here because the CMA is saying at a wholesale level they're competitors because they're both selling products to retailers and it's the same retailers and then they're selling them in competition down the stream. But I think the point that Cérélia are making is that even if that is true, obviously they are both selling the wholesale product. The wholesale product that is being sold in the case of Jus-Rol, incorporates a product which has already been made by Cérélia.

MR PALMER: Yes.

MR RIDYARD: So I can see in a way you are both right but you are talking at cross-purposes, I think.

MR PALMER: Jus-Rol's activities in the supply chain status as a supplier can't depend on whether it happens or the extent to which it contracts out the manufacturing. In actual fact, they don't contract it all out.

MR RIDYARD: No.

MR PALMER: The figure is 75 per cent of what they sell is manufactured by Cérélia but the balance not.

MR RIDYARD: But I can --

MR PALMER: In other countries it's 100 per cent manufactured by Jus-Rol, so their status as supplier is exactly the same. What they then subcontract, obviously, needs to be taken into account for any analysis of the incentives of the parties and how competition then plays out in consequence of that. But that's different from saying: well we are not in competition at all. Plainly, as the CMA concluded, they plainly are.

MR RIDYARD: Yes.

MR PALMER: Sorry, sir, I think I cut across you.

THE CHAIR: No, that's fine, you were just saying what I was going to say, so it's fine.

MR PALMER: So that was the assessment and then consideration of the products from 9.35, the second half of this stage of the analysis and looking at the comparison between the actual products and the assessment of that at 9.39. Differences in quality are limited, in particular in relation to the premium PL range of retailers, so some differentiation but overall, 9.41, physical characteristics, intended use, are very similar. Then you get into the final section of this first part which is an assessment of the product range. That is then considered. 9.46, significant overlap, the same types of

ingredient, pastry, analysis of that, competing closely in various products, such as pizza dough.

Then you get into the evidence of competition between the parties, the second half of this first section of the analysis of closeness of competition and this section, at 9.50, is then split down into five. Again, some flagging for headings would help, but it's important to view those next sections as all fitting in here as the evidence of competition.

You can see they look at the parties' views first of all, then third party views -- that's where Mr Kennelly has focused his attack -- then the available tendering evidence, then the parties' internal documents -- again, an attack on some of that from Mr Kennelly but more limited -- and then assessment of the parties' views on the CMA's assessment of competition between them which by this stage, had already appeared in the provisional findings. So that's how it's structured.

The views on competition are set out at 9.51. They are not analysed at this stage, just recorded. Then at 9.52, you get the section beginning with grocery retailers' views on competition between the parties. And here, through to 9.53, 9.54, set out those views. I have already shown you some appearing at B. But the tribunal will have read through, again with a focus, obviously, on the largest retailers. Again, you don't find here any support for this sort of naked threat making, implicit or explicit, which we were told about.

What you find at 9.53, they're found to be competitors in that wholesale supply. Again, which is a necessary finding because that had been disputed. Then at 9.54, there's a degree of competitive tension that they can use as a lever in negotiations. Now that's what my learned friend interprets as naked threat making, independently of commercial reality, but that's not what is being described and it's a shame that's not what has been found. The leverage in negotiations is, you know: give us your best

offer, you know, knowing, the supplier knowing that their best offer is going to have to be good enough to win or maintain the volumes that they would like.

That's the leverage, not a threat. You see that again from the summary and, of course, all the evidence you were shown yesterday and this morning. Underlies the summary.

Yesterday we went through these retailers with the first one -- this is not in the order you were taken yesterday but the first one on this page, 9.54A, stated that:

"Changing volumes in response to their offers was a lever the retailer is able to pull if the parties increase price or decrease quality and due to the limited presence of alternative suppliers rebalancing own labels and brand proportions, is seen as a more important and viable option than switching suppliers entirely."

We saw this earlier on as well:

"This retailer stated that the ability to flex volume is enhanced by the fact that the products are very similar."

The last confidential point, again which is supportive of the view of this dynamic which I have described to you, rather than the one you were told about yesterday.

So, again, it's the response to the offers is the lever and, of course, you can have negotiations, you can say: well can you give me a bit more. If you are talking to Jus-Rol, for example, and they are seeking to increase their volumes there, you might well be asking them questions about: what promotions can you offer? And that's being done against the background where Jus-Rol knows that they need to make it as attractive as possible, if they are going to get those additional volumes, in circumstances where the PL supplier, Cérélia, would also be doing their best to be as attractive as they can.

Then you get on to B:

"Another large retailer told us that the price differential with branded products, typically expected to be more premium, was key in separate negotiations with the parties,

helping the retailer assess meaningfully, value for money and competitiveness. It told us that having at least two distinct suppliers provides the retailer with an objective, independent benchmark for use in negotiations with suppliers and explained that although a branded product might carry a price premium, it would use separate supplier negotiations to assess the cost price position of each and the differential between them, to help assess value for money and competitiveness."

Again, nothing -- this is exactly what you would expect if you took a step back and asked yourself what would I expect? But nothing around this involves independently making threats rather than simply responding to the best offer and saying: well okay, you have a more expensive product. To what extent can I sell that price premium in the store and how many will I shift? And, obviously, the retailer will resort to their own sophisticated tools of analysis to anticipate how a wholesale offer might pan out for them on the aisles, given what they think they can charge for it.

MR RIDYARD: One thing you might expect from this sort of analysis would be evidence of diversion ratios. In other words, if one of the suppliers raises price and loses 100 units of volume, how does that 100 units get distributed among competitors and, specifically, how many of those hundred gets picked up by the other merging party.

MR PALMER: It would be open to CMA to perform a diversion analysis. I think this underlies some of Mr Kennelly's submissions, where effectively, he was saying: well if you are going to take this into account, any rational regulator must perform such a diversion analysis and calculate the sort of costs and benefits which might be achieved.

Now I don't know the extent to which retailers will themselves assess the costs and benefits of various different flexes, different balances between the two. No doubt they have very sophisticated mechanisms. But for the purposes of the CMA here,

assessing a wholesale market, it is not essential to work out the exact effect of particular details of particular deals at retail level.

MR RIDYARD: So you are saying the CMA didn't do that but it doesn't have to do.

MR PALMER: It doesn't have to.

MR RIDYARD: I mean you might also expect the parties to present evidence on diversion ratios too.

MR PALMER: Quite, if they thought it was material.

MR RIDYARD: I mean Mr Kennelly took us to some bits and pieces on that but was that a core part of their submissions? Or maybe it's a question --

MR PALMER: No, is my understanding but the tribunal, if we can point to any particular analysis. But whether or not they are submitted, the CMA is entitled to stand back from this and say: look, the parties concede that these products compete at retail level. We'll just have a look at 9.117 which is at page 228. This was a change during the investigation. It's recorded here:

"Cérélia initially submitted that branded and PL products are differentiated products which do not compete closely at the retail level but in a later submission, Cérélia submitted that it is common ground that Jus-Rol branded products and PL products do compete for consumers at the retail level and that Jus-Rol is lacking differentiation compared to PL products."

Again, at that retail level you have.

So you've got that conceded. Another way of describing that concession is to say that there is material diversion between the products and that is enough. You then move to consider incentives post-merger as well and the incentives to put up prices in both channels or to degrade both the quality -- a diversion ratio, if you are able to calculate it, takes you no further in that analysis.

MR RIDYARD: Well sometimes it's considered quite a useful input to that analysis.

MR PALMER: In a retail merger consideration --

MR RIDYARD: In any merger, I would say.

MR PALMER: Let's say (inaudible) in the retail merger guidance which you have in the bundles and to which my learned friend referred, you find specific consideration of that but you don't find that in the MAGs in relation to horizontal and unilateral effects. It's one tool which is open to you to use but the question is, do you have sufficient evidence, sufficiently probative, which you can look at as a whole and say: this is significant enough that I don't need to know the precise diversion ratio, all I need to know is how the incentives change and, in particular, that following the merger, there would be, as we'll come to, an incentive on the merged entity to increase prices in both lines of product or degrade quality in both lines of product and that takes you far enough.

Also, you have to do that, of course, in the context of knowing the joint share of supply the merged entity would have at this stage which we can't give a figure, it's confidential, but it's in the 60 to 70 per cent bracket. In that (inaudible), when you have that share of supply, when you have those incentives, the CMA's position is that you don't need a diversion ratio in order to identify an SLC.

I will come back to that point a little bit later on but that's the immediate answer. The CMA rationally took the view that it could identify SLC through this analysis which I am showing you bit by bit and we say there is no need or call to calculate that precise diversion ratio.

I will just catch up with myself. I was in 9.54B. I shan't read it all out but you can see that same dynamic, as I have described it, is explained -- I have shown you a lot of it already. C is a third large retailer which is summarised, saying the parties compete for space allocated to DTB products by retailers and then they explain what that is driven by. Not their ability to make any threats but by that.

This is because the nature of the category forces the retailer to manage a mix rather than simply expanding a range it stocks and it's said that it has -- and then a particular form of leverage. That is explicitly over what is described there, not some sort of independent threatening power. Indicated that this leverage is slightly mitigated by the fact that Cérélia produces the majority of the Jus-Rol products supplied to the retailer. It maintains, however, there is competition between the parties in terms of pricing to drive sales and it's submitted that:

"The use of this leverage has taken place in every negotiation over the last few years and comes in the form of retail pricing, promotional strategy and adjusting ranges."

So that's the form it comes in, not in the form of threat making: do this or I'll go to the other side, regardless of those things, but explicitly based on the pricing, the strategy, the ranges, obviously in response, as we've seen, to the offers.

Then another large retailer described the potential to use that tension between the parties in negotiations and explained that pre-merger, it could flex modular space, vary the share of shelf between PL and branded suppliers to its commercial advantage and in response to end consumer needs:

"For example, if Jus-Rol were to significantly increase prices pre-merger, it could consider stocking more PL products. However, this retailer also said the conversations around ..."

Now what's confidential there and you'll see the caveat at the end.

So that was the evidence on competition, as summarised there, from the grocery retailers but then you get their views at 9.55 on the direction of the constraint. Again, this is analysed later, this is just recording their views at this stage. Then at 9.56, their views of the constraint on wholesale prices deriving from competition between the parties. You can see in particular at 9.57:

"When asked whether wholesale prices helped determine the wholesale prices of

branded products, more than half responded, including two, that they did.

"PL generated pricing discipline because PL products would expect to cost less and one large one stated that the merger would mean it would be unable to offset brand for range changes and commercial competitiveness to ensure we have great prices. And one large retailer, when talking about certain relations with suppliers, explained it looked at the price differential between the PL product and a brand and that it trades competitors off against each other."

It explains that:

"The presence of at least two separate and viable suppliers, each offering high quality products, creates competitive tension, something that we leverage implicitly to generate jeopardy and negotiate a good commercial outcome for us and our customers."

Again, all of the evidence has been that jeopardy, as it's put, being generated not by the making of threats but going with the flow of commercial self interest. That's what creates the jeopardy, the risk. That's what they are concerned with, not simple threat making.

One smaller retailer's view. Then grocery retailer views on the nature of the constraint is separately analysed. And you see one large retailer describing a commercial process, focused on supplier's competitiveness and profitability for the retailer. And it indicated:

"In discussions, it would not necessarily ...(Reading to the words)... and not particularly needed to do so in negotiations. It also told us the option to switch between its existing supplier and Jus-Rol was more important than the option to change supplier."

Just pausing there, it's perfectly right for my learned friend to say: look, during the course of the various calls, interviews, hearings, the CMA did ask questions, such as: okay, so do you threaten to switch to the other side and to the other channel if they

don't give you what you want? So those questions were asked. It was a legitimate question to ask. But it's important not to confuse the asking of those questions and conflate it with the whole theory of harm because what the retailer said consistently in answer to those questions, as indeed Mr Kennelly eloquently pointed out, was effectively: no, no, we don't do that. What we do is focus on competitiveness and profitability and we don't directly reference offers, we don't say: well so and so is offering me this, what can you do to beat that? We encourage them to give us their best offer across price, quality (inaudible) and whatever else you can throw in. In the background they know it's got to be good enough to win the day. They don't know what the other side is offering, that's what creates the competitive tension.

So, again, with the hunt for the snark and all of this, went on and on, with again, the answers coming back, saying: no, we don't do that. Certainly no explicit threat making but as you see at the top of 199, another large retailer submitting:

"The competitive tension is implicitly present in any negotiation."

That doesn't mean an implicit threat, a nod, a hood, a wink or anything of that kind, it's simply that both parties know that there is an alternative and they've got to do their best.

Again, that retailer, as recorded and as taken into account and as understood by the CMA there, explicitly in 960B, it would not typically refer to the constraint from the other party, focusing instead on the best possible offer each supplier could produce. But that it is, nevertheless, competitive pressure which would be lost as a result of the merger. They'd no longer have that incentive to produce their best offer, subject to external constraints. That's what we'll come to, of course, in due course. But that's the tension which is being identified by the retailers and what would be lost.

That takes you to the end of the review of the evidence of the retailers' view, so not in a sort of mish-mash of uncoordinated chronological sequence that we went through

yesterday, but on a themed basis, taking those or (inaudible) footnoted. You'll be able to map back if you choose to undertake the exercise. I will turn to some of the individual points tomorrow that Mr Kennelly made about some of the documents but it's important to understand these were properly analysed. They were treated as evidence. They were treated as probative of those matters, the direction of the constraint, the nature of the competition, the nature of the constraint and so forth, alongside lots of other evidence.

At no point in this decision does the CMA say: we're just focusing on this retailer alone or: we are just focusing on retailers, full stop. We find in SLC it's part of the evidence which is assessed and goes into the mix which is compared to what competitors are saying, it's compared to what the parties are saying and what their internal documents say and it's from that you get the conclusions which are reached.

This exercise of taking a single piece of evidence in isolation is an unpromising one from the start but in particular, when what you are hunting is not the underlying basis of this decision but a mythical snark.

Then you get to the competitor views on competition between the parties from 9.62. Again, setting out their competitive views and then an assessment which I have shown you already, to the effect which my learned friend says is irrational at 9.67, broadly and consistent and coherent view that there is an implicit but important constraint between the parties which will be lost as a result of the merger. That isn't, at this stage, the final word. That's the summary of third party views, at this stage retailers and competitors on those matters.

It goes on to consider other matters but at that point it's saying that's what we've got from the retailers and competitors. There is nothing irrational in that conclusion, contrary to my learned friend's submission.

(Inaudible) evidence is then considered and then we are on to internal documentary

evidence on competition. That's from paragraph 9.71. You will see that Cérélia's submissions are recorded. They say they don't perceive each other as directly competing, don't monitor each other's performance, was their world view. From 9.73 onwards there's an analysis of internal documents, starting with Cérélia's documents and then moving on to GMI or Jus-Rol's documents which starts at 9.80.

Just flag up at 9.75 is where -- and onwards -- I won't be specific about any of this because so much of it is confidential, but this is the sections which are the evidential basis for the conclusions on benchmarking and monitoring. I certainly won't read all that out but direct your particular attention to those paragraphs and the observations made about those documents, all the way through to 9.86. And then further documents considered at 9.87 on evidence of constraint on wholesale prices, deriving from competition between the parties.

Then on grocery retailer evidence on the nature of the constraint. Again, 9.88 through to 9.89. Finishing with the assessment of those documents at 9.90 to 9.92 which I have already shown you.

Rational conclusions here as to how much they monitor each other. This is all in the context of closeness of competition, remember. Monitoring the sale and retail prices. Monitoring and benchmarking. You can see those conclusions.

Then the final section on closeness of competition, I showed you part of this earlier, is the parties' views on our assessment of competition between them, where again, the CMA assessed what is being said back to them about that. First of all, in the claimed lack of evidence of a competitive constraint and you will see that that is fully analysed from 9.94. We note the evidence provided by retailers, that the competitive dynamic is not typically explicit, it's generally consistent with the position reflected in the internal documents and in other suppliers' descriptions of their negotiations. And several reasons why the evidence provided by the retailers should be given material weight in

assessing whether the merger gives rise to competition concerns.

So here are actual reasons given as to why this evidence is not only probative but now a matter for the CMA, given material weight. Then that conclusion about consistency, explaining that implicit constraint and articulating a degree of concern about the merger in similar terms and they've set out separately as a cross-reference why one retailer's evidence, in particular, should be given less weight, for reasons which are explained.

Secondly, over the page, at 218, these large retailers comprise a clear majority, likely to be more directly impacted by the merger. It's not only -- clear majority but they also stock both and flex volumes between the two. So they're best, most likely to provide insight into how this competitive dynamic plays out in practice.

That touches on some of the questions the tribunal was asking Mr Kennelly yesterday about: well, you know, these retailers are saying this, that's evidence, why -- you know, can this evidence be treated as probative, can rationally, weight be attached to it? The answer is, obviously, yes, because they are sophisticated operators who know this particular dynamic and how it plays out in practice better than anyone. They are the ones doing the negotiating, they are the ones who are making these decisions on volumes and it is consistent across them.

There's no consistent explanation that, yes, we routinely threaten them but that isn't the theory of harm and that's not what is said:

"Third, as carefully articulated in the PS, the grocery retailers who mentioned the concern described the competitive restraint as implicit and, given this description, we would therefore not expect to see it being communicated to the merged parties, particularly in a small market with few alternative suppliers, where the available supply options to grocery retailers would generally be expected to be well understood."

Of course Cérélia understand, when they turn up in negotiation, they are competing

against Jus-Rol or any other branded supplier, Pizza Express, branded or anything else like that. Of course Jus-Rol know, as we see from their documents, that they are competing and worried about the threat from PL and the market share that they have because it's well understood and doesn't need to be mentioned. It's quite different from a sort of tender context, where you have head-to head competition, particularly a negotiation context, where you will, in that specific context, expect to see documents directly playing one off against each other in a specific competition. It's not at all surprising to see that sort of document in that sort of context.

But what the CMA is saying here, rationally, a supportable view of the evidence, is that we wouldn't expect to see documentary evidence of this implicit background that, you know, you are competing against the other side here.

MR RIDYARD: But if that's a threat, that works pretty well in a tender negotiating process and you can think of lots of tender situations where those kind of threats are made. You know your rival is bidding a better price than you. Unless you can match them, you are out of the contest sort of thing. Why aren't the retailers using those same tools in this setting?

MR PALMER: It a different dynamic at work. In the tender context, a supermarket is looking for one supplier to provide its PL channel products. It's going from one to the other for a contract of either a specific period of time or indefinite until reviewed, to say: you are going to provide all of my needs through this channel, manufacture all of the DTB products I want. It's clearly going to play them off against each other in that context, to get the best deal they can.

In this context we are concerned with here, if you are talking about flexing volume, they are not looking for all their suppliers from one, they are looking to supply, particularly big supermarkets, products in both; smaller supermarkets in one or the other but the big ones in both. They want to supply both. They are not playing them

off in that way.

They are looking at the volumes from each at any given moment in time which are going to serve their commercial ends which includes, of course, serving their customers as best as they can at that point -- give an end. You don't do that by saying: you have to improve your offer, improve your offer, because they are saying the negotiating dynamic works. They are describing which they should know and saying: we are encouraging you to give us your best offer, effectively blind of what the other side are doing. That's what they all describe. Now you might be able to envisage a world in which they say someone -- certainly the CMA asked questions about it: do you do this? A perfectly legitimate question to ask and to investigate but the universal answer back is: no, we don't do that, we invite them to compete on PQRS, we encourage them, we negotiate with them, say: improve your offer and we take that away and we then decide to what extent we are going to flex, how are we going to spread those volumes between the two different routes and they keep them on their toes, effectively.

MR RIDYARD: It seems like the CMA was asking those questions, expecting to get the answer: yes, we do play them off and then they consistently didn't get that answer. I am not saying that's fatal to your case or anything --

MR PALMER: It's not even a fair description of what the CMA were doing. They were genuinely asking the questions. They were listening -- I will go through it, if I need to, tomorrow, the suggestion that asking leading questions or no one mentioned these points until they were directly asked. We reject all of that. It isn't true, when you read the documents. But what they were doing is responding to what they were hearing and seeking to understand it.

So they were hearing from retailers, various explicit competitive tension which were used to leverage to get the best deal. "Oh, interesting: what do you mean? Do you

mean that you threaten that if they don't match an offer from -- then you'll go with the other?" "No, no, no, that's not what we mean. What we mean is we constantly invite the best deal, the best commercials, we explore promotions, we explore prices, we explore quality and we make our decisions on that."

Now that's how they choose to operate. The CMA does not make up the rules of the game here, they do. And it's the CMA's job to record accurately what they say, to describe it accurately, as they have, and then to say: well, okay, given that competitive tension, given that competitive dynamic would -- as the retailers say, there would be a loss if these firms merged and you've no longer, between these two very big players, got that same level of interaction and what would the effect of that be?

It's their job just to take that and analyse it and that's what they do.

MR RIDYARD: Yes.

MR PALMER: So that's the third point.

Then finally, as noted, the evidence provided by retailers is supported by other evidence available to the CMA and that is explained and, again, it's crucial. It's not just looking in the silo of one source of evidence, whether it's retailers generally or one particular retailer, but looking at all the evidence across the board and forming an overall evaluation of the lot.

That is why at 9.95, the CMA strongly disagrees with Cérélia's contention there's not some evidence somewhere in support of the existence of an ability to trade off the parties' respective offerings and in particular it notes the consistency of that rebalancing threat being in hearings and questionnaires. In one case describing it as arising in every negotiation:

"Also obtain documentary evidence of the constraint of retailers being unwilling to share details of competing offices, confirming the implicit nature of the competitive leveraging and, in particular, of monitoring and benchmarking itself against PL

products."

And so it goes on. I don't need to read it out, I am conscious of that, I am trying to avoid doing it but you see that's the response.

Then the next response at 9.98, is the idea that retailers are unable to exercise a constraint. I have shown you this earlier. That leads to the points at 9.101, 9.102, 9.103 which I don't need to take time over again.

Then the parties' submissions that the third party evidence is not reliable is dealt with and that is assessed. Points are recorded and I need not read them out. They are assessed at 9.105 onwards and 9.106, the CMA doesn't agree with the characterisation that the statement of one retailer is unclear, particularly when viewed in the fuller context and so on and so forth through the various points, where it's said this is unreliable, acknowledging in the case of one supermarket, 9.109, that there is an inconsistency in that particular retailer's evidence. And goes on to explain we attach lower weight to that and there are some reasons as to why that might have been, in particular, involving a change of personnel.

But, again, that's all considered, weighed, dealt with, as you'd expect. And to say there's no evidence supporting the theory of harm, and nothing probative, is utterly unreal, once you have a proper view of what the theory of harm is, how it operates, what the competitive conditions are. Then you have the nature of the constraint being dealt with from 112 which introduces the nature of constraint and the parties argue back about whether innovation is involved, innovation pipeline, whether that's a real thing and whether that was a factor.

Again, that is assessed by reference to the evidence from 113. That is the end of the first of the three headings under closeness of competition and then you get -- which I can deal with more quickly as it's not an issue -- competition at the retail level, that being set out, but including on the evidence of substitutability competition at retail level

and then substitutability at the retail level, all that being considered and an assessment from 9.130 to 133. Again, making clear, although there are elements of differentiation, there is competition, particularly because, at 9.132:

"End consumers are often choosing between one branded and one equivalent PL product."

At 9.113:

"It suggests that PL products which really is the contracted supplier and Jus-Rol compete closely for end consumers. Competition at the retail level is linked to competition at the wholesale level. This should be taken into account. This close competition at the retail level is an indication of closeness of competition between the parties at the wholesale level."

Not that it's determinative or it's identical but it's an indication of.

Again, when you are going through those underlying documents my learned friend says: ah, but this relates to retail, not wholesale. You can't treat it in a silo, you can't hive it off, at least that was the CMA's assessment, which was not irrational, that it's relevant and informative of the competition at wholesale level, even if not determinative.

Then the final of the three headings under the closeness of competition section, which is the vertical relationship between the parties. That's dealt with in 9.134, again recording the representations and the views of third parties, setting out the evidence on Cérélia's view of the channels at 9.140.

Then the assessment at 9.141 to 942, noting that Cérélia's role, that its current role in manufacturing Jus-Rol, is based on the contractual relationship, materially different to a merger.

"Contractual relationships don't result in a lasting change in market structure, have limited duration and may be renegotiated or terminated even before its initial term.

The implications for competition of a non-structural, term-limited contractual relationship are different from the ownership of a target business. The merger will, in contrast to the previous outsourcing arrangement, bring about a permanent change in the market structure and notwithstanding the existing vertical link, the merger would result in material changes in competitive dynamics and market structure."

They are then identified, A, B, C below, control over the entire commercial strategy, including all aspects of the wholesale PQRS offering to retailers across both channels, which it does not have at present and which we know is the precise basis upon which that competition currently happens.

"In particular, Cérélia would have control over pricing of both the PL products supplied by Cérélia in PL channel and Jus-Rol, including brand equity margin and could determine price points and therefore relative pricing to maximise joint profits.

"It also cements Cérélia's role as the manufacturer", that's B, so control all risk of commercial strategy. It would no longer be subject to the risk of change of PL supplier to GMI.

Lastly, even if Cérélia were as is said there, this is not true for GMI which was unambiguously worse off if retailers switched sales from Jus-Rol to the PL channel and therefore incentivised to compete to avoid this happening. "Even if" of course is not accepted, and there's separate reasoning about that. You'll have seen the debate about margins and how reliable the margins are as a source of data, given the questions of cost allocation which would underlie the calculations of those margins, so there is considerable doubt about that.

But even if, unambiguously, Jus-Rol would be worse off at the moment if retailers switched from Jus-Rol to own brand and that will not be the case after the merger. Nonetheless, 9.143, still relevant.

Further submissions, again responding to the parties after the PS follow, and that's

when you get to the conclusion I showed you earlier, 9.150, on closeness of competition. That's the second of the main headings, concluding at 9.156:

"In the round, we consider that the evidence supports the view that there is material competitive interaction between the parties and this competition would be removed by the merger, thereby reducing the ability of retailers to protect themselves against potential price rises by a particularly large supplier with full control over PQRS."

But that's when you come into the alternative competitive constraints point, which is the third point on the list I showed you at the beginning of this chapter. Again, you see that the CMA begins by directing itself, in accordance with the MAGs again, the framework being applied, particularly at 9.158 you have the footnote to paragraph 4.3 of the MAGs:

"Under a horizontal unilateral effects theory of harm, the main consideration is whether there's sufficient remaining good alternatives to constrain the merged entity post-merger and the ability for customers to switch is key to the competitive process; and if the costs of switching to another are high, the merged entity may be able to raise prices or degrade quality without losing many customers and high switching costs may weaken the bargaining position of customers and make them less sensitive."

Then at 9.160 an application of that is introduced. At 9.161:

"With few existing suppliers, the merger firms enjoy a strong position or exert a strong constraint on each other."

Again, that's recalling the MAGs, paragraph 4.3.

Then, working through that, you get the analysis of switching. Again, an important context provided at 9.166, under the heading of "Switching". This is obviously central under the MAGs, but this is referring back to the earlier analysis in chapter 7 I showed you -- it doesn't do it all again -- the nature and cost of switching which, as you know,

you'll recall, it's relatively easy and costless between existing suppliers, but switching supplier within each channel is rare and difficult or very difficult, according to the majority of the market players. That is what is being recalled there and why it rarely happens.

It's against that background that you get the analysis of the constraint from the PL suppliers. Now there is a challenge to the findings on this so I won't go through that now. I will deal with that challenge to the findings with respect to two of those suppliers, Bells and Henglein tomorrow. But as the tribunal will be aware, what the CMA does here is go through each supplier and assess the strength or otherwise of the competitive constraint that they impose. In respect of two, Bells and Henglein, they find that to be a limited competitive constraint and the others effectively immaterial or very very weak, so that's why the focus is on those two.

But, again, it's important to bear in mind -- and we'll come back to this when we look at the evidence on those two -- I am conscious of Mr Kennelly's complaint that, well, the assessment -- we had new evidence, the assessment didn't change, they still said it's limited competitive constraint. Well, what does limited mean here? That's not a sort of quantified judgment, it's a qualitative judgment. What you are saying is: not strong enough to defeat the effects of the loss of the competitive dynamic which we identified at 9.156. That is what the merger guidelines are asking you to do, is to look about whether there is sufficient good alternatives to constrain.

So if you are saying it's limited, you are saying: not strong enough. You are not saying it's not a constraint at all. You are not saying that they are irrelevant. You are saying it's not enough to get you over the bar of saying: in view of that level of constraint, we are not concerned that the competitive dynamic is going to change in the way that we have earlier identified.

So that's why you get at the final end of this section, 9.32 -- sorry, that's the wrong

reference, 9.310, where it's headed "Our current view on alternative competitive constraints". I think that heading is a hangover from the PFs. This is of course their final view in the Final Report. So this is their view on alternative competitive constraints, summarising their earlier conclusions.

At 9.311, that they have considered out of market constraints as well. At 9.312, considering the aggregate competitive constraints as well, putting those earlier separate constraints together, looking at market share at that point, the limited nature of the competition with the stronger of the firms having a substantially lower share, and an important observation about one of them, and a less compelling offer to the largest retailers in the case of the other, not a point which my learned friend focused on. He focused exclusively on capacity.

Again, we'll come back to the detail of that. But the conclusion at 9.213 is they faced limited competitive constraints from alternative suppliers, both individually and in aggregate.

Then by a power, which isn't the subject of any challenge but obviously separate consideration of that, leading to conclusions at 9.332 onwards.

Then at 9.334 another section, again going right back to the beginning of section 9, dealing with the impact of the merger on competition, which is still not saying that this is a done deal, that's the end of our analysis, you know. They now assess the relative importance of the various constraints that they have identified, and that's what the exercise is going on from 9.335 through to 9.336, recalling their findings so far through that section.

Then against that background -- and this is a summary, this isn't the actual findings here. Again, it has to be read -- for example, my learned friend took you to 9.335 here, saying:

"We have found that the parties' offerings to retailers are differentiated and the

constraint between them does not typically manifest itself through direct competitive interactions, in particular through head-to-head competition in tenders", with one exception in the footnote.

He says: well, that's the finding that there's no direct competition. Absolute nonsense, if I may respectfully say so. This is a summary recall of the detailed findings earlier on, which are very specific about the nature of the competition and the direct nature of them, even though they are not head-to-head in a tender forum.

But, anyway, that is the context in which those observations arise. Then, against that background, that summary of all the work which has been done so far in chapter 9, third party views on the impact are reviewed from 343. Then competitors' views, separately from retailers and the view of other third parties, all of that is gone through.

The conclusion, 9.364:

"More weight to the evidence provided by grocery retailers and competitors than unaffected third parties."

Then, against that background, the next heading is "The effects of the loss of competition between the parties", and this is obviously absolutely crucial. You get the analysis of the incentives here in the horizontal unilateral effects, and this is done again by reference to the MAGs.

Paragraph 9.365 sets out and incorporates text from 2.2, 2.6 and 2.7:

"Noting the importance of the loss of incentives and that the competitive incentives may be dulled to the detriment of customers, the lessening competition and may lead to lessening competition that's substantial", and so forth.

Referring to the tribunal's previous findings in JD Sports:

"But where (a) the merging parties are close and compete on a variety of aspects of PQRS and (b) that sufficiently demonstrates the merger result in the SLC, there is no need to undertake a granular exercise in respect of each of the parameters of

competition, including on the likely impact of the merger [on the main parameters of competition] on pricing", which is where my learned friend says: well, you can't rationally do anything other than assess such things as diversion ratios and so forth. It's not necessary, against that background. This is explained, that chain of causation, at 9.367. We've considered how suppliers compete in the relevant market and found that pre-merger constraint is important, limited alternative suppliers. We've found that there are various aspects of PQRS that the parties compete on, which are important and which the (several inaudible words) deteriorate to the detriment of customers and, subject to countervailing factors, that's chapter 10, represents an SLC and, accordingly, competitive incentives are likely to be meaningfully dulled, creating an incentive to deteriorate any of these aspects of PQRS.

Again, I don't want to read it all out but the scope of the SLC is then explored. There seemed to be challenge to this by my learned friend, although rather faintly argued. Again, 9.370, noting the tension in the submission between the parties' previously stated position that it should be considered as a whole and that retailers take a holistic approach. Some examples are given of that.

At 9.372, a series of examples were also provided of fluidity in the product offerings of providers once present in the category, which we consider undermines the view that we should view competition as confined to a static snapshot. Examples of that fluency going on.

Then at 9.375 I highlight:

"Whilst we accept that the parties may exert a stronger competitive constraint on each other in certain market segments, this does not mean that there is no constraint or SLC when the parties do not provide the same SKU to a retailer at present, see chapter 7, ongoing process of rivalry, and the competitive constraint between the parties can have an effect both where Cérélia and Jus-Rol are existing options for a

retailer or may be in the future. That doesn't mean, therefore, that market present has not disciplined Jus-Rol's price offering, based on the knowledge that the retailer could procure a PL version of the SKU from Cérélia", and that is consistent with market definition, it's in line with evidence of the strong supply side substitutability and the parties' submissions regarding product scope. It's also consistent with retailers' evidence.

Finally, at 9.378 we note that the merger is unlikely to influence a retailer's decision on whether to stock only branded PL products or both.

"As such, the supply options may not change for retailers which offer only branded or PL. But with respect to these retailers, we acknowledge that there's likely to be less of a merger effect, although we note that a product deterioration or price increase from a lack of constraints in other channels may spill over to affect these channels too."

Anyway, it's a minority of the total DTB products.

So, again, you heard from Mr Kennelly earlier, there is no consideration of a rational scope, no consideration of these points, but there is consideration and there is a rational reasonable view taken, even if others might disagree with that.

Then analysis of the nature of the harm and the parties' incentives. Again, noting from the MAGs in paragraph 9.380 the relevant guidance, the trade-offs which will be faced, and in this regard, applying that, we note that post-merger Cérélia would have full control over PQRS on both channels. We've had these points before but relevant in this context, a variety of strategies would be open.

Then this is important now because there are three strategies identified and three sets of incentives to consider, incentives to degrade the Jus-Rol channel on its own, followed by incentives to degrade the PL channel on its own, but then incentives to degrade both.

A strong finding here at 9.381, firstly an observation:

"It is difficult to predict which of the scenarios would be adopted. Cérélia would be able, as a result of the lost competition brought about, to pursue different commercial strategies over time. Nonetheless, we've considered the parties' submissions on the possibility of worsening terms and, in particular, the nature of harm that could result from the merger. In our view, this analysis is heavily dependent [that's the parties' analysis] is heavily dependent on ambiguous data and it provides only a partial explanation as to whether certain commercial scenarios are more or less likely, and we note in particular the margins data and incentives arguments are only relevant to degradation of the PL and branded channels in isolation."

That's very very important because, with regard to the third scenario, the degradation of both channels, the parties' submissions instead rely on the existence of alternative competitive constraints. So they relate to their ability to degrade both channels and do not make any submission in relation to their incentive to do so. It would have a clear incentive to do so. Their ability to do so would be one and the same argument, with the extent of the constraint, the strength of the constraint, provided by alternative PL suppliers, which is why it's taken back to Bells --

MR RIDYARD: Can I ask a question on that. If, contrary to your analysis and conclusions, you looked at the two channels individually and said: well, we've looked at the incentives on Jus-Rol and we've found that there's no unilateral incentive for them to raise price on Jus-Rol, and then you did the same for Cérélia on its private label products and you came to the same conclusion, then could there still be an incentive jointly to raise prices, even if there was no incentive to raise the price individually?

MR PALMER: That's a matter for competitive assessment, not for me. I am here to defend the rationality of the (several inaudible words due to overspeaking) --

MR RIDYARD: I am just wondering does the CMA report have a view on that?

MR PALMER: -- you could not have incentives to do one or either individually in some particular market, not this one. But, collectively, yes, together you could have an incentive to raise both prices if you are not facing an external constraint (several inaudible words due to overspeaking) --

MR RIDYARD: I did not mean to ask you a question about economic theory. I was just trying to understand what the CMA's case was on this.

MR PALMER: Well, I will show you. The first -- because you'll see a difference in the approach separately. Incentives to degrade the Jus-Rol channel is dealt with first and the assessment on that is dealt with from 9.387. You'll see again an acknowledgment that the incentives are affected by the vertical relationship between the parties.

So:

"The merged entity will take into account not only Jus-Rol brand equity margin but also the manufacturing margin previously earned by Cérélia."

There's also an acknowledgment at 9.388 that if manufacturing margins are similar across the PL and branded channels or larger in the branded channel, it would appear in theory to not make economic sense to degrade Jus-Rol channel if the expectation were that customers would divert from Jus-Rol to PL or alternative in response.

So under those conditions -- it's a big if, of course -- under those conditions, the margin would be offset by the loss, but an incentive to degrade the Jus-Rol offering could be present if the manufacturing margin in the PL channel was greater than in the branded channel, so it will depend on that.

MR RIDYARD: So is it saying that the SLC conclusion depends on the margin being --

MR PALMER: No, it doesn't.

MR RIDYARD: Okay.

MR PALMER: Because at the moment this is looking at just this incentive to degrade Jus-Rol --

MR RIDYARD: Yes, sorry.

MR PALMER: -- on its own.

MR RIDYARD: So you are saying that the conclusion on the Jus-Rol product depends on a particular view about the relative margins of manufacturing on Jus-Rol versus the private label?

MR PALMER: I am saying the incentives which were being analysed at that point would depend on the margins. But that's not where it ends because you then see the criticism of the margin data and you can't rely on the margin data which has been produced.

But there's an acknowledgment that even if it were the case that X, the incentive for the merged entity to divert sales from the more profitable channel to the PL channel is likely to be limited if that were the case.

On the other hand, we note that even if the incentives for the merged entity to degrade the Jus-Rol products in relation to the PL channel post-merger is limited, there is still some loss of constraint on Jus-Rol in the branded channel because of the merger because pre-merger Jus-Rol is unambiguously worse off if retailers switch to PL and Jus-Rol was therefore under competitive pressure.

So that is -- and post-merger they will have full knowledge. So the loss of this rivalry may weaken the incentive.

If we just pause there, no one pins the SLC independently on to that. You take an overall view that there is a qualified assessment of limited incentives and qualified damage in that respect, but then you go on to say: well, what's the incentives to degrade the PL channel and you get a very different picture.

MR RIDYARD: Yes.

MR PALMER: That's at 394 to 395. Again, I need not read it out. The assessment is there. It's there explained: we do compete; it will remove a constraint; limited ability

to go elsewhere to switch PL suppliers to the extent assumed by the parties, leaving the merged entity able to profitably increase its prices or degrade quality.

We note at 9.395:

"The incentive to degrade may be strong as the Jus-Rol equity brand premium means that the branded channels are likely to be more profitable for the merged entity ...(Reading to the words)... fallen away."

But then they turn, at the top of the next page, to incentives to degrade across both channels. So all these are assessed. You find the conclusions on that at 9.398 to 9.401. You find that they do have the incentive and indeed the incentive may be strong, is the finding at 9.399, an illustration of how that works at 9.400 and the submission that they wouldn't be able to profitably raise prices or degrade is not supported by the available evidence.

Then in that context, talking about the ability of pass through in the context of grocery retailers to price match and the extent that that will happen, again there has been no separate attack on that.

The conclusion at 9.406, or 9.405 and 9.406:

"Even if retailers were to engage in such price matching behaviour, this would not prevent the harm that arises for the reasons given."

Then, finally, in this run of headings, there is the nature of the SLC:

"We consider that the consultation paper [this is 9.409], when viewed in its totality [this is responding to an attack on the further consultation], is clear and explicit and that its reasoning in relation to the theory of harm did not change from the provisional findings."

So that was a specific response to a specific submission.

Then the conclusion on the SLC at 940(?) which I need not read out, the tribunal will have seen it. But it's only then, drawing all of that together and having followed that

process, that you get to the conclusion of the SLC, there are some summary conclusions referring back, back to the supply share with which we kicked off, back to the closeness of the competition, the weakness of alternative constraints, the effects, the incentives.

Then chapter 10 is not challenged, the absence of countervailing factors leads you to the identification of the SLC.

I have gone through that, and I am sorry if it's tedious to go through what the tribunal has already read, but I wanted to show you that structure, the way it follows the guidance and principles laid down in the MAGs. That is a coherent framework and that it does not depend on any of the things which Mr Kennelly asserted we must look for in the underlying evidence, noting that he didn't go to any of that analysis, beyond about four paragraphs, in support of his claim that that's what it all turned on, on the CMA's assessment of the SLC.

That is 5 o'clock and the natural break-off of the process. I hope, having done that, I can do a lot of referring back tomorrow. I think, depending on the timetable, to have equal time if we started at 10.30 I think I would be going through to 3.30. If we start a bit earlier -- I am entirely in the tribunal's hands.

THE CHAIR: Mr Kennelly?

MR KENNELLY: It may be safer, subject to the tribunal, to start at 10.15.

THE CHAIR: So we'll adjourn until 10.15 tomorrow.

(5.03 pm)

(The hearing adjourned until Wednesday, 12 July 2023 at 10.15 am)